(1)

87-1232 No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARY ROSE,

Petitioner,

—against—

LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee of the Plan, T. P. MOORE and JOHN DOE, as members of the Plan's Board of Managers, T. M. TARANTO, J. B. HUFF and H. J. LIBERT, as members of the Plan's Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE as members of the Joint Board on Pension Applications, and the LONG ISLAND RAILROAD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Where the widow and seven orphans of a railroad worker were denied survivor's benefits from a railroad's pension plan solely because the worker, who was a vested participant with over 26 years of service, died in service without having chosen a survivor's option; and

Where ERISA provides that under such circumstances survivor's benefits must be paid, but exempts from that provision a "governmental plan";

(1) Was it error for the Second Circuit to hold that the railroad's plan was "governmental", where the railroad was a private stock corporation, its employees were not public employees, and the plan was not a public plan under state law?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Mary Rose prays that a writ of certiorari issue to review the order of

the United States Court of Appeals for the Second Circuit entered in this case on September 3, 1987.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is reported at 828 F.2d 910 and is set forth at Appendix A herein. The bench ruling of the District Court for the Eastern District of New York, dated September 26, 1986, is not reported and is set forth at Appendix B herein.

An earlier opinion of the Second Circuit in this case (later vacated) reaching a contrary conclusion is set forth at Appendix C.

Jurisdiction

The order of the Court of Appeals for the Second Circuit was dated and entered on September 3, 1987. Petitioner filed a timely motion for rehearing and rehearing in banc, which was denied on October 20, 1987 in an

order set forth at Appendix D herein. This petition for a writ of certiorari was filed within ninety days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

There are no federal constitutional provisions involved in this petition. The federal statutory provision involved is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. ("ERISA"), more particularly 29 U.S.C. § 1002(32) and 29 U.S.C. § 1055. The relevant texts of those and other relevant statutory provisions are set forth at Appendix E herein.

Statement of the Case

Petitioner Mary Rose is the widow of Richard A. Rose and the mother of his seven

children. Mr. Rose died of leukemia on January 8, 1976, after attaining age 50 - the "normal retirement age" under the Long Island Railroad Pension Plan (the "Plan") - and working 26-1/2 years as a clerk for defendant Long Island Railroad Company ("LIRR"). At the time of his death Mr. Rose's right to a pension from the LIRR was fully vested; accordingly, at that time he was eligible to retire with a "service age" pension pursuant to the terms of the Plan.

The Plan provided for the option of converting service-age benefits into a pension of equivalent actuarial value payable to the retiree over his lifetime and to his surviving spouse for her lifetime (the "survivor's option"), provided such option was exercised in writing at least six months before retirement or death.

On February 24, 1976 plaintiff made

formal application to the LIRR Pension Plan for a survivor's pension as widow and beneficiary of Mr. Rose. On November 23, 1976, however, the majority of the Joint Board on Pension Applications - then composed of five members, three appointed by management, two by the unions - voted to deny plaintiff a survivor's pension on the sole ground that Mr. Rose had not exercised the survivor's option before his death. As a result, despite Mr. Rose's long years of service, neither he, while alive, nor his widow and seven children received any pension benefits whatsoever.

Although it is conceded that Mr. Rose did not exercise the survivor's option before his death, it is undisputed that he never waived that option. Sections 205(a) and (e) of ERISA, 29 U.S.C. §§ 1055(a) and (e) (A-57), mandate the payment of a joint and survivor's

annuity to the spouse of a participant who dies after normal retirement age, unless those benefits were knowingly waived in writing by the participant. Because Mr. Rose never waived survivor's benefits, if ERISA applies to the LIRR Pension Plan, plaintiff is entitled to those benefits.

Defendants' sole defense is that ERISA does not apply to the LIRR Plan because it is a "governmental plan", exempt from ERISA coverage pursuant to the provisions of Section 4(b)(1) of ERISA, 29 U.S.C. § 1003(b)(1) (A-56). Defendants mainly base their argument on an expansive definition of ERISA's "governmental plan" exemption and a proportionally narrow definition of its coverage; and on the fact that the State of New York has been periodically subsidizing the Metropolitan Transportation Authority ("MTA"), defendant LIRR's holding corpora-

tion, and thus also the LIRR.

Under New York Public Authorities Law ("PAL"), however, the following is established:

1. LIRR employees at the relevant time were not public employees (PAL § 1265(9)(a)), or employees of the MTA (A-61);

2. The MTA and its subsidiary corporations (including the LIRR) must be run on a "self-sustaining" basis (PAL § 1266(3)) (A-64);

3. In 1966, when the MTA purchased the stock - but not the assets - of the LIRR from the Pennsylvania Railroad, all subsidiaries of the MTA were to be public benefit corporations. In order to retain the LIRR's status as a <u>private stock corporation</u>, the law was amended effetive May 23, 1966, retroactive to the purchase date of the LIRR, namely January 20, 1966, to permit the MTA to

own a private stock corporation as its subsidiary. (PAL § 1266(5)) (A-67).

4. Unlike a private stock corporation, a public benefit corporation cannot contract indebtedness (PAL § 1266(5)) (A-67);

5. Althought the MTA may issue bonds to finance its own and the LIRR's operations, the State is not liable in case of default (PAL § 1269(8))(A-69);

6. As non-public employees, the LIRR's employees were not eligible to join the New York State Employees Retirement Systems (PAL § 1265(9)(b) (A-62);

7. Because under New York law, the LIRR Pension Plan is not a public pension plan, its benefits are not protected against termination or reduction by the non-impairment clause of Article V, Section 7 of the New York Constitution (A-61);

8. The New York State Comptroller, who is charged with supervisory functions vis-a-vis all New York public pension plans, not only has declared himself to have no authority over the LIRR Plan, but has taken the position that supervision of the Plan is the responsibility of the U.S. Department of Labor, presumably pursuant to ERISA (A-71, 72).

REASONS FOR GRANTING THE WRIT

ERISA, one of the most far-reaching remedial statutes ever enacted by Congress, set minimum standards for private pension plans. Congress found that such plans affect "the continued well-being and security of millions of employees and their dependents", and are "affected with a national public interest." 29 U.S.C. § 1001(a) (A-51).

This case presents to this Court for the first time the question of the proper

interpretation of the "governmental plan" exemption from ERISA coverage. That exemption, as its name indicates, applies to the pension plans of federal, state and local governments, their agencies and instrumentalities.

The Second Circuit, in holding that the LIRR Pension Plan was an exempt "governmental plan", interpreted ERISA's "governmental plan" exemption very broadly; resolved all the acknowledged ambiguities in the definition against coverage, and deprived of all meaning certain words contained in the definition. Thus, it violated the most furdamental canons of statutory construction, disregarded Congress' remedial intent, and engaged in improper judicial legislation. If left undisturbed, the Second Circuit's decision will effect not only the rights of Mrs. Rose and her seven children, but those

of 8,000 LIRR employees and their beneficiaries. In addition, countless other workers throughout the country will be left unprotected because a far-reaching precedent will have been set for the broad interpretation of ERISA's exemptions.

Finally, the federal government will be deprived of federal jurisdiction over the pension plan of the very same railroad which this Court has recently held subject to federal regulation under the Railway Labor Act. United Transportation Union v. Long Island Rail Road Company, 455 U.S. 678 (1982) ("UTU").

A. The Court below violated the well-established rule of statutory interpretation that Congress is not to be presumed to have used words for no purpose, with its corollary that a court must, if possible, give effect to every phrase of a statute, so that no part is rendered superfluous.

1. The Court below read out of the "governmental plan" exemption the word "government"

The "governmental plan" exemption from Title I coverage is contained at 29 U.S.C. § 1003(b)(1)(A-56). "Governmental plan" is defined at 29 U.S.C. § 1002(32) (A-55) in pertinent part as follows:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Because the word "government" modifies both "State" and "political subdivision," in order to be exempt a plan must be that of

a political subdivision which is a government, or of an "agency or instrumentality" of a political subdivision which is a government. In other words, the term "governmental plan", as its title indicates, refers to plans of governments or of agencies or instrumentalities of governments. The reason for that is that Congress believed, as acknowledged by the Court below, that "'the ability of the governmental entities to fulfill their obligations to employees through their taxing powers' was an adequate substitute for both minimum funding standards and plan termination insurance." (A-9) Only governments have the taxing power. Because neither the LIRR nor the MTA (its holding corporation) has the taxing power, the LIRR's plan cannot be "governmental".

The Court below, however, chose a reading of the "governmental plan" exemption that

entirely eliminates the word "government" from the definition. The Panel concluded, in fact, that the plans of all political subdivisions are exempt, whether or not they are governments. It stated:

> If, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local governments, then it would not make sense to extend the exemption to state agencies and instrumentalities -- which are not governments -- while denying the exemption to public authorites.

(A-11)

Petitioner never maintained, however, that the plans of "state agencies or instrumentalities" cannot be exempt as "governmental." Those plans, however, are "governmental" not because those entities are the governments of political subdivisions, but because they are "agencies or instrumentalities" of such governments. It is governments that are responsible for the maintenance of their

"agencies or instrumentalities" through their taxing powers. No government has any obligation or responsibility for funding the LIRR Pension Plan.

The Court below pointed to the fact that, unlike the definitions contained in ERISA's Title I, at 29 U.S.C. § 1002(32) (A-55), "governmental" plans in Title III - in which Congress provided for the study of such plans with a view to future legislation - are referred to as established and maintained "by any State... or political subdivision thereof," without any reference to the word government. The Panel thus concluded that "[t]his phrasing does not suffer from the ambiguity of the § 1002(32) definition," because it "clearly encompasses all political subdivisions of states, whether or not they are governments." (A-12) Section 1231, however, goes on to state:

> In determining whether any such [governmental] plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as the taxing power of the government maintaining the plan.

(A-59) (Emphasis added) It is clear, in sum, that Congress meant to exclude as "governmental" only plans financed by governments. By ignoring the word "government" the Court below frustrated the will of Congress.

2. The Court below read out of the "established/maintained" definition of "governmental plan" the word "established"

Title I of ERISA (29 U.S.C. § 1002(32)) provides that a "governmental plan" is one "established or maintained" by a governmental entity. (A-55) Titles II (26 U.S.C. § 414(d))(A-60), III (29 U.S.C. § 1231) (A-58) and IV (29 U.S.C. § 1321(b)(2))(A-59), on the other hand, define such exempt plans as "established and maintained." Because the

LIRR Plan was established in 1938 by the Pennsylvania Railroad, a private corporation, the difference between the two definitions could be dispositive of the litigation.

The Court below agreed with petitioner that the "discrepancy" (A-22) in the definition of "governmental plan" finds no explanation in the legislative history of ERISA (A-22). It noted that "[t]he fact that both versions of the governmental plan definition lead to seemingly incongruous results makes the discrepancy all the more troubling." (A-23) Instead of choosing one of the two inconsistent definitions of "governmental plan", however, the Panel read out of ERISA the word "established" altogether and gave it no force or effect. It stated:

> the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions,

than the status of the entity which established the Plan.

(A-24) Yet, it is a long- and well-established rule of statutory construction that "Congress is not to be presumed to have used words for no purpose." Amato v. Western Union Intern., 773 F.2d 1402 (2d Cir. 1985), at 1408, cert. den., ____ U.S. ____, 106 S.Ct. 1167, 89 L.Ed. 2d 288 (1986) ("Amato"), quoting from Platt v. Union Pacific R.R. Co., 99 U.S. (9 Otto) 48, 58, 25 L.Ed. 424 (1878). Similarly well-established is the rule that "a court must, if possible, give effect to every phrase of a statute so that no part is rendered superfluous." Amato, supra, id., quoting from National Insulation Transp. Com. v. ICC, 683 F.2d 533, 537 (D.C. Cir. 1982). See also: Fulps v. City of Springfield, Tenn., 715 F.2d 1088, 1093 (6th Cir. 1983), and Zimmerman v. North American Signal Co.,

704 F.2d 347, 353 (7th Cir. 1983). The Court below, however, violated both rules of statutory construction.

B. The Court below also violated the equally well-established rule that, in construing a remedial statute, its coverage should be interpreted broadly, its exemptions, narrowly.

1. The Court below mistakenly chose a broad reading of the "governmental plan" exemption

As the court below recognized, ERISA contains two inconsistent definitions of "governmental plan," namely, "established and maintained," and "established or maintained." The difference between them is that the former definition is narrower than the latter, because it requires an entity to be both "established" and "maintained" by a governmental entity to be exempt from ERISA coverage. Because at issue is the definition of an exemption from a remedial statute, and

because the court below agrees that the same definition of "governmental plan" should govern throughout ERISA, it is the narrow definition that should prevail. Piedmont & Northern Ry. Co. v. Interstate Commerce Com'n., 286 U.S. 299, 311-312, 52 S.Ct. 541, 76 L.Ed. 1115 (1932). Indeed, Congress itself intended that exemptions from ERISA's coverage be construed narrowly. Connolly v. Pension Benefit Guar. Corp., 581 F.2d 729, 732 (9th Cir. 1978), cert. den., 440 U.S. 935, 99 S.Ct 1278, 59 L.Ed.2d 492 (1979). The Court below, however, adopted the broad definition of "governmental plan", thus violating a fundamental rule of statutory construction.

2. The Court below also construed broadly the term "established" in the exemption

The Court below stated that, "even if we agreed with Rose that the correct interpretation of § 1002(32) was established and maintained, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established and maintained by the LIRR." (A-24)

The Court below agreed that the Plan was set up by the Pennsylvania Railroad in 1938; it also agreed that the LIRR did not "terminate" the predecessor Plan, because "termination of a plan triggers the immediate vesting of all accrued benefits and distribution of plan assets [citations omitted]". (A-25) It also agreed that, "[a]ccording to the IRS regulations, replacement of a plan with a comparable plan does not constitute a 'termination'." Id. Nevertheless, the Court

below, in a truly remarkable non sequitur, held that the "details" of a plan's "establishment" were not a concern of Congress, and, that, therefore the LIRR's 1971 amendment in its entirety of the 1938 pension plan "established" the plan in 1971. (A-25) The Panel reached its conclusion by a "broad reading" of the term "established," as "more consistent with the legislative intent behind the governmental plan exemption." (A-26) Once again the court below refused to give a narrow interpretation to an exemption from a remedial statute, contrary to the well-established canon of statutory construction. Furthermore, while it purported to rely on Feinstein v. Lewis, 477 F.Supp. 1256 (S.D.N.Y. 1979), aff'd, 622 F.2d 573 (2d Cir. 1980), the court below ignored the first part of Feinstein's holding, namely that "Congress, in its exempting governmental

plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained." (Emphasis added) At the relevant time in 1976, of course, the LIRR employees were not public employees. UTU, supra, 455 U.S. at 681; PAL § 1265(9)(a) (A-62)

C. The Court below improperly applied to the interpretation of ERISA criteria applicable to the interpretation of the NLRB and Title VII

Thirteen years after the enactment of ERISA, neither the U.S. Department of Labor nor the P.B.G.C., nor the I.R.S. has issued any regulations clarifying the "governmental plan" exemption or providing definitions under ERISA of terms like "political subdivision" and "agency or instrumentality." Also, there have been no court decisions providing guidance with regard to the issues

in this litigation. As a result, the Court below has mistakenly engrafted court decisions concerning the NLRB and Title VII onto ERISA. As has been held recently, however, with regard to the similarity between the statutory definitions of "employer" found in the Fair Labor Standards Act of 1938, 29 U.S.C. § 203(d), and in ERISA, 29 U.S.C. § 1002(2),

> The method of analogy is, of course, a legitimate method of reaching a decision. But in matters of statutory construction of ERISA our responsibility is to ascertain the intention of Congress in ERISA and not its intention in enacting a separate federal statute.

Solomon v. Klein, 770 F.2d 352, 354-355 (3rd Cir. 1985).

In an attempt to justify this unnatural engrafting, the Panel resorted to selective citation stating:

> The NLRB guidelines are a useful aid in interpreting ERISA's governmental exemption, because

> ERISA, like the National Labor Relations Act, "represents an effort to strike an appropriate balance between the interests of employers and labor organizations." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647.

(A-14). The correct citation from the legislative history of ERISA, however, is quite different:

> The Bill reported by the Committee represents an effort to strike an appropriate balance between the interests of employers and labor organizations..., and the need of the workers for a level of protection which will adequately protect their rights and just expectations.

H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. (Emphasis added) It is clear from the legislative history cited above that the balance sought by ERISA was not between the interests of employers and labor organizations, as mistakenly stated by the Court below, but between those of employers and labor organizations on one side, and those of

the workers on the other. The NLRB guidelines, therefore are not "a useful aid in interpreting ERISA's governmental exemption," as claimed by the Court below. ERISA must be interpreted within the context of its own legislative history.

D. The Court below engaged in improper "judicial legislation".

The Court below held that the LIRR was an "agency or instrumentality" of the MTA, which in turn was held to be a "political subdivision" of the State of New York. In so holding, the Court entirely overlooked the fact that a corporation like the LIRR cannot, without more, be labelled an "instrumentality." A private corporation is held to be an "instrumentality" despite its presumptive separate legal identity only when it is shown that it is a mere shell, truly an "instrument of its shareholders or parent

corporation." The fact, however, that all of the LIRR's outstanding stock was owned by the MTA did not render it a "mere instrumentality" of either the MTA or the State, absent a showing that its separate legal identity had been destroyed. In re Beck Industries, Inc., 479 F.2d 410 (2nd Cir. 1973), at 417, cert., den., 414 U.S. 858, 94 S.Ct. 163, 38 L.Ed.2d 108 (1973). No such showing can be made by defendants and it would be to no avail if made, for the law is well settled that a corporation cannot challenge its own separate corporate identity when it suits its purposes. Schenly Distillers Corporation v. United States, 326 U.S. 432, at 437, 66 S.Ct. 247, at 249 (1946).

In a recent decision, the First Circuit reiterated in an ERISA context that "the principle of limited liability is a

cornerstone of corporate law," which is only limited "by the common law doctrine which permits the piercing of the corporate veil and by statutory exception..." De Breceni v. Graf Bros. Lessing, 828 F.2d 877, 879 (1st Cir. 1987). See also: Connors v. P & M Coal, 801 F.2d 1373 (D.C.C. 1986), and authorities cited therein.

One of the consequences of the Court's labelling the LIRR an "agency or instrumentality" of the MTA, and the MTA a "political subdivision" of the State of New York, is to open the State of New York to liability for the large unfunded liability of the LIRR Plan, the LIRR and the MTA. That result runs counter to the very purpose of maintaining the LIRR as a separate, private corporation in order to insulate both the State and the MTA from any liability incurred by the LIRR. The Court below clearly failed to take into

account the serious ramifications of its judicial legislation.

It is also important to note that the Court below, the first time this matter was submitted to it, held unanimously that the LIRR's Plan was not a "governmental plan." (A-34-48) All the reasoning the court found persuasive the first time around, it found unpersuasive the second time around, when it held that Plan was a "governmental plan" and, therefore, exempt from ERISA coverage. The only difference between the two appeals was that, in the earlier appeal, the LIRR did not argue that ERISA coverage would cost it money, because of the necessity to fund its unfunded Plan, while it did so in the second appeal. The court's second decision was entirely result-oriented, in that it sought to protect the LIRR from the need to fund its plan. ERISA, however, was enacted to protect employees, not employers. The Court's second

decision is a blatant example of judicial legislation that should be reviewed by this Court.

E. The payment of subsidies to the LIRR by the State through the MTA is irrelevant, as neither is an "employer" of LIRR employees

In providing that a "governmental plan" is one "established" and/or "maintained" by a governmental entity for its employees, ERISA focuses also on the governmental status of the "employer". "Employer" is defined by ERISA at 29 U.S.C. § 1002(5) as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan..." (A-55) The fact that the State through the MTA has been subsidizing the LIRR, however, does not cause either the State or the MTA to be considered an "employer" of LIRR employees. This is so because, as noted, LIRR employees are not

employees of either the State or the MTA. Moreover, the courts have held that not even a "person" acting as a surety with regard to pension obligations is an "employer" under ERISA. Carpenters South. Cal. v. Camp, 738 F.2d 999 (9th Cir. 1984); Carpenters South. Cal. v. Majestic Housing, 743 F.2d 1341 (9th Cir. 1984). The State of New York and the MTA are most certainly not sureties for the LIRR's obligations (including its pension plan obligations), and neither one has any legal obligation whatsoever to subsidize the LIRR. Indeed, New York law provides that the MTA must run its operations and those of its subsidiaries "on a self-sustaining basis." PAL § 1266(3) (A-64) It follows that the LIRR Plan cannot be exempt from ERISA coverage, because neither the State nor the MTA is an "employer" of LIRR "employees."

Moreover, neither the State nor the

MTA, the owner of the LIRR's stock, can be considered an "employer" under ERISA, unless they "engaged in conduct justifying 'veil-piercing'". Only "[w]hen conduct justifying 'veil-piercing' is present, the corporate form is disregarded... The law of 'veil-piercing' determines the legal identity of the ERISA employer." Connors v. Marontha Coal Co., 670 F.Supp. 45 (D.C., D.C. 1987); Connors v. P & M Coal Co., supra. There is no allegation of conduct justifying "veil-piercing" here. Furthermore, as discussed earlier, a corporate entity cannot "pierce" its own "veil".

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit in this case.

Dated: December 31, 1987

Respectfully submitted,

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APPENDICES

APPENDIX A Opinion of the Court of Appeals for the Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 959—August Term, 1986

(Argued: March 30, 1987 Decided: September 3, 1987)

Docket No. 86-7942

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustee of the Plan, T.P. MOORE and JOHN DOE, as members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, as members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, as members of the Joint Board on Pension Applications, and THE LONG ISLAND RAILROAD,

Defendants-Appellees.

Before:

MESKILL, PIERCE* and ALTIMARI,
Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Bramwell, J.) granting defendants' motion for summary judgment on the ground that the Long Island Railroad's pension plan was a governmental plan and therefore exempt from compliance with the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.*

Affirmed.

EDGAR PAUK, Legal Services for the Elderly, New York, N.Y. (David S. Preminger, New York, N.Y., Rosen, Szegda, Gersowitz, Preminger & Bloom, of Counsel), *for Plaintiff-Appellant.*

EUGENE P. SOUTHER, New York, N.Y. (Seward & Kissel, Bruce D. Senzel, Mark J. Hyland and Dan J. Schulman, New York, N.Y.; the Long Island Railroad

* Judge Pierce was designated subsequent to oral argument, pursuant to Second Circuit Rule 0.14, to replace Chief Judge Feinberg, who recused himself.

Company, Thomas M. Taranto and Roger J. Schiera, of Counsel), *for Defendants-Appellees.*

ROGER M. OLSEN, Assistant Attorney General, Washington, D.C. (Michael L. Paup, David English Carmack and B. Paul Klein, Attorneys, Dept. of Justice, Washington, D.C.; William F. Nelson, Chief Counsel, Internal Revenue Service, Washington, D.C.; George S. Salem, Solicitor of Labor, Dept. of Labor, Washington, D.C.; Gary M. Ford, General Counsel, Peter H. Gould, Deputy Assistant General Counsel, Kenton Hambrick, Attorney, Pension Benefit Guaranty Corporation, Washington, D.C.), *for the United States as Amicus Curiae.*

JUDITH A. GORDON, New York, N.Y., Assistant Attorney General of the State of New York (Robert Abrams, Attorney General of the State of New York) *for the State of New York as Amicus Curiae.*

ALTIMARI, *Circuit Judge*:

This case brings before us, for the second time, the question of whether the Long Island Railroad's ("LIRR") pension plan is a "governmental plan" within the meaning of section 3(32) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1002(32), and is therefore exempt from compliance with Title I of that

statute. *See* 29 U.S.C. § 1003(b)(1). The issue arises in the context of Mary Rose's suit for survivor's benefits, to which she claims entitlement pursuant to section 205(a) of ERISA, 29 U.S.C. § 1055(a). Following a remand from this court in 1982, the District Court for the Eastern District of New York (Bramwell, J.) held that ERISA did not apply to the LIRR Pension Plan because it was a "governmental plan." The district court accordingly granted defendants' motion for summary judgment and dismissed Rose's complaint for lack of subject matter jurisdiction.

We conclude that during the period of time relevant to this appeal, the LIRR Pension Plan was a "governmental plan," and we affirm the decision of the district court.

BACKGROUND

The story of this litigation begins in 1976 with the death of Richard Rose. Rose had been employed as a clerk by the Long Island Railroad. Although he was fully vested in the LIRR Pension Plan ("the Plan") and had for some months been eligible to retire, Richard Rose was still working at the time of his death.

Under the Plan, Richard Rose was entitled to receive a "service-age" pension upon retirement, payable monthly for his lifetime without survivorship benefits. He also had the option of converting the "service-age" benefits into a pension of equivalent actuarial value, payable to the retiree for life and then to the surviving spouse for life. Under the terms of the Plan then in effect, the survivorship option had to be elected in writing at least six months prior to retirement or death. Had Richard Rose elected

this option, the monthly benefits payable during his own lifetime would have been reduced to reflect the future payments to his surviving spouse.

Richard Rose never elected the survivorship option. After he died, his widow, Mary Rose ("Rose"), applied to the LIRR for survivorship benefits. The Board of Managers of the Plan denied her application because her late husband had not made the required election. The decision of the Board of Managers was subsequently affirmed by the LIRR's Joint Board on Pension Applications.

On June 5, 1981, Rose commenced the instant action for survivor's benefits and other relief in the Eastern District of New York, alleging that the LIRR Pension Plan violated section 205 of ERISA, 29 U.S.C. § 1055. That section requires that all retirement plans covered by ERISA must provide benefits to the surviving spouses of employees who die before retirement. *Id.* § 1055(a)(2). These survivorship benefits are payable *unless* they are expressly waived by the employee. *See id.* § 1055(c)(1)(A). It is undisputed that Richard Rose never expressly waived survivorship benefits.

The district court concluded that the LIRR Plan was exempt from compliance with ERISA's vesting provisions because it was a "governmental plan" under 29 U.S.C. § 1002(32). On January 4, 1982, the district court dismissed Rose's complaint for lack of subject matter jurisdiction.

Rose appealed the dismissal of her complaint, and on September 28, 1982, this court reversed the decision of the district court. We noted that the language of the "governmental plan" exemption was ambiguous, and proceeded to examine the legislative history of ERISA in

order to determine whether Congress would have intended the LIRR Plan to be exempt from its coverage. We held that the LIRR Plan *was* subject to the vesting and participation requirements of ERISA, because such a holding would "not implicate any of the concerns that led Congress to exempt governmental employee benefit plans."

Following this court's reversal of the district court, defendants petitioned for rehearing. In support of the petition, both the State of New York and the United States of America filed briefs as amici curiae, taking the position that the LIRR Plan was an exempt "governmental plan." The panel granted rehearing on December 23, 1982, finding that "significant matters exist in this case that were not fully litigated in the district court and that, therefore, were not fully presented on appeal." These "significant matters" included the extensive state funding of the LIRR through the Metropolitan Transportation Authority, and the potential impact on state taxpayers if the LIRR Plan were required to comply with ERISA's funding requirements. Defendants argued that if the financial burden of ERISA compliance were to fall on the taxpayers, then the Congressional concerns behind the "governmental plan" exemption would indeed be implicated.

The panel accordingly vacated and withdrew its previously-issued opinion, vacated the decision of the district court and remanded "in order that [the significant] matters might be presented to and considered fully by the district court."

On remand, the parties engaged in extensive discovery. In April 1986, defendants moved for summary judgment,

still asserting that the LIRR Plan was exempt from ERISA coverage. Rose cross-moved for summary judgment in June 1986.

On September 26, 1986, Judge Bramwell issued a brief ruling from the bench, granting defendants' motion for summary judgment, denying plaintiff's cross-motion for summary judgment and once again dismissing her complaint. The district court held:

> After carefully considering the voluminous submissions of the parties in connection with these motions, the Court is again convinced, as it was back in December of 1981, that the LIRR Plan is and has been at all times relevant to this case a "governmental plan" as defined by Section 1002(32) of ERISA.

It is from this dismissal that Mary Rose now appeals.[1]

DISCUSSION

I. *The "Governmental Plan" Exemption from ERISA Coverage*

ERISA was enacted, after years of study, in order to remedy long-standing abuses and deficiencies in the private pension system. *See generally* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4639. *See also* 29 U.S.C. § 1001. These

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1 Following the 1982 remand, neither the United States nor the State of New York sought leave to intervene or to file amicus briefs. Subsequent to the argument of this appeal, however, and pursuant to a request by this court, the United States submitted a new amicus brief and the State of New York submitted a letter, reaffirming their positions that the LIRR Plan was an exempt governmental plan.

deficiencies included inadequate vesting provisions, insufficient assets to assure payment of future benefit obligations, and premature termination of under-funded benefit plans. *See id.*

Title I of ERISA, 29 U.S.C. §§ 1001 *et seq.*, contains various substantive and procedural requirements with which covered plans must comply. These include standards for vesting, funding and fiduciary responsibility, as well as the survivorship provision under which Mary Rose claims a right to benefits. Title II of ERISA is codified in the Internal Revenue Code, 26 U.S.C. §§ 401 *et seq.*, and contains requirements pertaining to the qualification of pension plans for favorable tax treatment. Title III, 29 U.S.C. §§ 1201 *et seq.*, contains ERISA's administrative and enforcement provisions. Title IV, 29 U.S.C. §§ 1301 *et seq.*, establishes the Pension Benefit Guaranty Corporation ("PBGC"), which guarantees the payment of benefits by plans which terminate with insufficient assets to pay those benefits.

Although Congress considered whether ERISA should apply to "public" or "governmental" benefit plans, it ultimately decided to exempt such plans from compliance with most of ERISA's requirements. *See* H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. Instead, Congress decided to undertake further study of the adequacy of public retirement plans, in order to determine "the necessity for Federal legislation and standards with respect to such plans." 29 U.S.C. § 1231(a)(3). To date, no such legislation has been enacted.

The governmental plan exemption was included for several reasons. First, it was generally believed that public plans were more generous than private plans with respect

to their vesting provisions. H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4667. Second, it was believed that "the ability of the governmental entities to fulfill their obligations to employees through their taxing powers" was an adequate substitute for both minimum funding standards and plan termination insurance. S. Rep. No. 383, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4890, 4965; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 4670, 4756-57. Finally, there was concern that imposition of the minimum funding and other standards "would entail unacceptable cost implications to governmental entities." H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830. *See also* H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4668.

This Congressional reluctance to interfere with the administration of public retirement plans is in part based on principles of federalism. For example, the report of the House Committee on Education and Labor stated:

> There are literally thousands of public employee retirement systems operated by towns, counties, authorities and cities in addition to the state and Federal plans. Eligibility, vesting, and funding provisions are at least as diverse as those in the private sector with the added uniqueness added by the legislative process. For this reason the Committee is convinced that additional data and study is necessary before any attempt is made to address the issues of vesting and funding with respect to public plans.

H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. *See also Feinstein v. Lewis*, 477 F. Supp. 1256,

1261 (S.D.N.Y. 1979) (purpose of ERISA governmental exemption was to "refrain from interfering with the manner in which state and local governments operate employee benefit systems"), *aff'd*, 622 F.2d 573 (2d Cir. 1980).

The governmental plan exemption from Title I coverage is codified at 29 U.S.C. § 1003(b)(1). "Governmental plan" is defined in 29 U.S.C. § 1002(32), which provides in pertinent part:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

The sole issue on this appeal is whether the LIRR Pension Plan was an exempt "governmental plan" in 1976 when Mary Rose applied for survivorship benefits.

Rose raises a preliminary issue of statutory construction: she asserts that the phrase "by the government of any State or political subdivision thereof" should be interpreted as meaning *the government of any state or the government of a political subdivision of a state*. Under Rose's interpretation, a plan which was established or maintained by a political subdivision of a state would only be entitled to the exemption if the political subdivision were itself a *government*, for example a local government.

Defendants, on the other hand, argue that the phrase in question should be read as *the government of any state, or a political subdivision of any state*. Under this broader interpretation, a political subdivison would not have to be

a government itself in order for its benefit plan to be exempt from ERISA coverage. Rather, a plan which was established or maintained by any kind of political subdivision would qualify for the exemption.

We acknowledge that the statutory language is ambiguous; however, we are persuaded that defendants' interpretation is the correct one. Defendants' interpretation comports better with a common-sense reading of the statute, and also is a more logical interpretation. Section 1002(32) exempts not only plans "established or maintained . . . by the government of any State or political subdivision thereof," but also plans "established or maintained . . . by any agency or instrumentality of any of the foregoing." If, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local *governments*, then it would not make sense to extend the exemption to state agencies and instrumentalities—which are not governments—while denying the exemption to public authorities.

Further support for defendants' interpretation is found in 29 U.S.C. § 1231, the provision which directs Congress to conduct further studies of public retirement plans. The benefit plans which Congress is directed to study include:

> retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

Id. § 1231(a). It is reasonable to assume that these plans are the same "governmental plans," as defined in

§ 1002(32), which are currently exempt from ERISA coverage under § 1003(b)(1).

Section 1231(a) uses the phrase "established and maintained . . . *by any State . . . or political subdivision thereof*" (emphasis added). This phrasing does not suffer from the ambiguity of the § 1002(32) definition. By omitting the words "the government of" before the clause "any state . . . or political subdivision thereof," section 1231(a) clearly encompasses *all* political subdivisions of states, whether or not they are *governments*. The clear meaning of § 1231(a) thus provides an additional key to interpreting the ambiguous language of § 1002(32).

Finally, *Feinstein v. Lewis*, *supra*, one of the few cases interpreting the governmental plan exemption, held that the exemption applied to employee benefit plans established and maintained by two different school districts. 477 F. Supp. at 1262. School districts are certainly not "governments," in any ordinary sense of the word.

We therefore conclude that a retirement plan is exempt from Title I of ERISA if it is established or maintained (1) by the government of a state; (2) by a political subdivision of a state; or (3) by an agency or instrumentality of either of the foregoing.

II. *The LIRR is an Agency or Instrumentality of the MTA, a Political Subdivision of the State of New York.*

The Long Island Railroad Company was chartered in 1834 as a private stock corporation, the purpose of which was to provide freight and passenger service to Long Island. In 1966, all of the LIRR's outstanding stock was acquired by the Metropolitan Transportation Authority

("MTA"). Since that time, no private individual has held any beneficial interest in the LIRR.

The district court held that the LIRR Plan was an exempt "governmental plan" because "the LIRR is an agency of at least the [MTA], and perhaps of the State of New York . . . [and] the MTA is a political subdivision of the State." We agree with the district court that the LIRR Plan fits the statutory definition of a "governmental plan."

A. *The Metropolitan Transportation Authority*

Because ERISA is a federal statute, the term "political subdivision" must be interpreted by reference to federal law, in the absence of clear legislative intent to the contrary. *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 602-03 (1971) (quoting *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62-63 (4th Cir. 1965)). Although the term "political subdivision" is not defined in ERISA, several different sources of authority point to the conclusion that the MTA, which wholly owns the LIRR, is a political subdivision of the State of New York.

In *Hawkins County*, the Supreme Court considered whether the respondent Utility District fell within the political subdivision exception to jurisdiction under the National Labor Relations Act. *See* 29 U.S.C. § 152(2). To guide its analysis, the Court adopted the NLRB's criteria, which "limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." *Hawkins County*, 402 U.S. at 604-05.

The Court concluded that the Utility District was a political subdivison under the NLRB criteria. In further support of its decision the Court noted that the District had the power of eminent domain, was a public corporation under state law, and that the District's property and revenues were exempt from all state and local taxes. *Id.* at 606-07. *See also Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp.*, 547 F.2d 18 (2d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977) (under the *Hawkins County* criteria, New York State public benefit corporation was political subdivision within the meaning of pre-1972 exemption from Title VII coverage).

The NLRB guidelines are a useful aid in interpreting ERISA's governmental exemption, because ERISA, like the National Labor Relations Act, "represents an effort to strike an appropriate balance between the interests of employers and labor organizations." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647. Under the *Hawkins County* analysis, the MTA is clearly a political subdivision of the state because it satisfies both of the alternate NLRB criteria. The MTA, a public benefit corporation, was created in 1965 by the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 *et seq.* *See id.* § 1263(1)(a). The purposes of the MTA are "the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district." *Id.* § 1264(1). These purposes are "in all respects for the benefit of the people of the state of New York and the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title." *Id.* § 1264(2). Thus, the MTA meets the first

criterion because it was "created directly by the state, so as to constitute [a] department or administrative arm[ ] of the government." 402 U.S. at 604.

In addition, the MTA is administered by board members who are appointed by the governor with the advice and consent of the senate, and are removable by the governor. *N.Y. Pub. Auth. Law* §§ 1263(1)(a) & (7). Thus, the second NLRB criterion is satisfied because the MTA is "administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-05.

Additional guidance is provided by two early but significant decisions of this circuit, *Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner of Internal Revenue v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), which also required the court to determine whether a particular entity was a political subdivision. *See Philadelphia National Bank v. United States*, 666 F.2d 834, 837 (3d Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982) (terming *Shamberg* and *White* the leading cases on this issue).

Shamberg and *White* involved determinations of whether interest on bonds issued by the Port of New York Authority and the Triborough Bridge Authority, respectively, were exempt from federal taxation because the issuing entities were "political subdivisions" within the meaning of the controlling Revenue Acts. Both authorities were held to be political subdivisions, because they were created pursuant to state statute in order to carry out the traditionally public function of operating bridges and tunnels; moreover, the State had delegated certain of

its sovereign powers to the authorities, including the power of eminent domain and the police power.

Like the authorities in *Shamberg* and *White*, the MTA performs an "essential governmental function," N.Y. Pub. Auth. Law § 1264(2). It also possesses many other indicia of sovereignty. The MTA has the power of eminent domain, *id.* § 1267(1). Its property and revenues are exempt from all state and local taxes, *id.* § 1275. It may establish rules "for the conduct and safety of the public" which preempt local ordinances, *id.* § 1266(4), and the facilities, activities and operations of the MTA are not subject to the jurisdiction of any local authorities, *id.* § 1266(8).

We see no reason why the *Hawkins County* and *Shamberg* analyses should not apply to the term "political subdivision" as used in ERISA. We therefore conclude that the MTA is a political subdivision of the State of New York within the meaning of 29 U.S.C. § 1002(32).

B. *The Long Island Railroad*

(1)

The MTA acquired all the outstanding stock of the LIRR in 1966, pursuant to N.Y. Pub. Auth. Law § 1266(5), which permits the MTA to "cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations." Prior to 1966, the LIRR had been a private stock corporation owned by the Pennsylvania Railroad. The LIRR remained a stock corporation until 1980, when the MTA converted it into a public benefit corporation.

N.Y. Pub. Auth. Law § 1266(5) provides that the directors or members of the LIRR "shall be the same persons holding the offices of members of the [MTA]." In addition, the LIRR possesses "all of the privileges, immunities, tax exemptions and other exemptions of the [MTA]." *Id.* These include all the powers and privileges detailed in the previous section.

The MTA acquired the LIRR with funds loaned to it by the state. This loan was subsequently "repaid" by a 1967 state bond issue, a portion of the proceeds of which was appropriated to the MTA to repay the loan. The LIRR's sources of revenue include farebox receipts, freight and miscellaneous revenues, and substantial state and federal subsidies received through the MTA. Since its acquisition by the MTA, the LIRR's income from fares and freight has never been sufficient to meet its expenses, and it has operated at a substantial loss each year, prior to subsidies. For example, according to the 1976 MTA Annual Report, the LIRR had expenses of approximately $254 million but revenues of only $134 million in that year.

Each year, the LIRR prepares its budget for the following calendar year and submits it, along with its "projected operating and capital subsidy requirements, to the MTA for approval. The MTA then submits such of the LIRR's requests as it approves, along with its own operating and capital subsidy requirements, to the State Division of the Budget. Between 1967 and 1976, the LIRR received more than $450 million in subsidies through the MTA. In the Second Circuit opinion in *United Transportation Union v. Long Island Rail Road Co.*, 634 F.2d 19 (2d Cir. 1980), *rev'd on other grounds*, 455 U.S. 678 (1982), this court observed:

> [H]ad the MTA not taken over the operations of the LIRR in 1966, there probably would be no LIRR today. The substantial state and local funds used to subsidize the railroad attest to the fact that no private businessman would dare undertake the venture.

Id. at 28.

(2)

Like the term "political subdivision," the terms "agency" and "instrumentality" are not defined in ERISA, nor are there any regulations under ERISA which interpret these terms. The Internal Revenue Service, however, has had occasion to define "agency or instrumentality" under 26 U.S.C. § 414(d). That section was added to the Internal Revenue Code by Title II of ERISA and defines those "governmental plans" which are exempt from certain qualification requirements for favorable tax treatment. *See* 26 U.S.C. §§ 410(c)(1)(A), 411(e)(1)(A), and 412(h)(3). The definition of "governmental plan" in § 414(d) is virtually identical to the definition in 29 U.S.C. § 1002(32).

In interpreting the § 414(d) exemption, the IRS has consistently relied on Revenue Ruling 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality:

> In cases involving the status of an organization as an instrumentality of one of more states or political subdivisions, the following factors are taken into consideration: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on

behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.

Because the IRS is one of the agencies charged with administering ERISA, its interpretations of the statute are entitled to great deference. *See Hawkins County*, 402 U.S. at 605; *Belland v. Pension Benefit Guaranty Corp.*, 726 F.2d 839, 843 (D.C. Cir.), *cert. denied*, 469 U.S. 880 (1984). As evidenced by the discussion in the previous section, the LIRR satisfies all six of the IRS criteria: (1) the LIRR serves an "essential governmental function," *see* N.Y. Pub. Auth. Law §§ 1264(2), 1266(5); (2) it performs its function on behalf of the State of New York, *id.*; (3) it is wholly owned by the MTA, a governmental entity, *id.* § 1266(5); (4) it is controlled by the same public appointees who are members of the MTA, *id.* §§ 1263(1)(a), 1266(5); (5) the LIRR performs functions delegated to it by the MTA pursuant to express statutory authority, *id.* § 1266(5); and (6) the LIRR is heavily dependent on state subsidies to meet its operating expenses.

Finally, the reasons for exempting governmental plans from ERISA apply with equal force to the LIRR. The LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4756-57. Moreover, in light of the state's past practice of funding the LIRR's operating deficits, any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830.

Rose argues that this history of state funding is irrelevant to the question of the LIRR Plan's status, because the state is not legally obligated to fund the LIRR. Rather, Rose asserts, "such subsidy is a policy choice made by the state on a year to year basis, and there is no guarantee that the policy will not be changed in any subsequent year." Rose is correct about the non-obligatory nature of the state funding, but her argument ignores the fact that many governmental services are funded in the same manner.

As a practical matter, the State of New York has demonstrated its commitment to sustain the LIRR for the past twenty years, and reinforced its commitment in 1980, when the MTA converted the LIRR into a public benefit corporation. For all the foregoing reasons, we adopt the

IRS criteria and conclude that the LIRR is an "agency or instrumentality" of the MTA under 29 U.S.C. § 1002(32).

III. *The Meaning of "Established or Maintained."*

On this appeal, Rose raises a new issue of statutory interpretation which we also must address. She asserts that the clause of § 1002(32) which provides that a governmental plan is one "established *or* maintained" (emphasis added) by a governmental entity, should be read instead as established *and* maintained. Furthermore, she claims that the LIRR Plan was not both established *and* maintained by a qualified governmental entity, and therefore should not benefit from the governmental plan exemption.

Rose's interpretation of the "established or maintained" language in 29 U.S.C. § 1002(32) derives from the definition of "governmental plan" in Titles II and IV of ERISA. Title II, as discussed earlier, defines governmental plans in the context of an exemption from certain plan qualification requirements. *See* 26 U.S.C. § 414(d). The Title II definition is identical to the Title I definition *except* that it uses the phrase "established and maintained." The "established and maintained" language is also used in Title IV of ERISA, *see* 29 U.S.C. § 1321(b)(2), in which governmental plans are exempted from the plan termination and insurance requirements of that Title. Finally, Rose points out that certain other ERISA definitions use the "established and maintained" language. *See, e.g.*, 29 U.S.C. § 1002(33) ("church plan").

Rose concludes that the use of "established or maintained" in 29 U.S.C. § 1002(32) was simply the result of "congressional inadvertence," and that the Title I defini-

tion should be read consistently with the other definitions of governmental plan, as "established and maintained." Rose neglects to mention, however, that several other ERISA definitions use the "established or maintained" language. *See* 29 U.S.C. § 1002(1) (definition of "welfare plan"); *id.* § 1002(2)(A) (definition of "pension plan"); *id.* § 1002(16)(B) (definition of "plan sponsor"); and *id.* § 1002(40)(A) (definition of "multiple employer welfare arrangement").

Nothing in the legislative history of ERISA offers a clue as to the significance, if any, of the inconsistent definitions of governmental plan. In the *Feinstein* case, 477 F. Supp. 1256, the district court took note of the discrepancy but decided to interpret the "established or maintained" language of 29 U.S.C. § 1002(32) according to its literal meaning. *Id.* at 1260 & n.6.

It is a fundamental principle of statutory construction that the starting point must be the language of the statute itself. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). "[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Id.* (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

On the other hand, "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones University v. United States*, 461 U.S. 574, 586 (1983). *Cf. Swaida v. IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983) (declining to apply literal meaning of "year of service" definition in section 203(b)(2)(A) of

ERISA, 29 U.S.C. § 1053(b)(2)(A)), *aff'd*, 728 F.2d 159 (2d Cir.) (per curiam), *cert. denied*, 469 U.S. 874 (1984). Courts have interpreted "or" as meaning "and," and vice versa, in order to carry out the legislative intent of a statute. *See United States v. Moore*, 613 F.2d 1029, 1039-40 & nn. 84-86 (D.C. Cir. 1979) (collecting cases), *cert. denied*, 446 U.S. 954 (1980).

Rose argues that adopting the literal meaning of "established or maintained" would lead to anomalous results which are inconsistent with the purpose of the governmental exemption. For example, a plan which was originally established by a governmental body but subsequently taken over by a private entity would continue to qualify for the exemption, despite the fact that the now-private plan would no longer be backed by the security of the government's taxing power. We agree with Rose that this result indeed seems to conflict with Congress' goal of "remedy[ing] certain defects in the private retirement system." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4639. *See also* 29 U.S.C. § 1001.

Unfortunately, the "established and maintained" reading leads to an equally anomalous result. If a plan is required to have been both established *and* maintained by a governmental entity in order to qualify for exemption, then a plan which was established by a private entity but subsequently taken over by a governmental body would continue to be subject to ERISA. This outcome conflicts with the federalism-based concerns which led Congress to exempt governmental plans in the first place.

The fact that both versions of the governmental plan definition lead to seemingly incongruous results makes the discrepancy all the more troubling. The PBGC, which

administers Title IV of ERISA, has resolved the dilemma by not construing the "established" requirement strictly where to do so would frustrate congressional intent. Thus the PBGC's position is that "a pension plan maintained by a public agency or political subdivision which has been taken over from a private business is excluded from the provisions of Title IV." PBGC Op. Ltr. 75-44 (December 8, 1975). We find the PBGC's approach to be a sensible one; the status of the entity which currently maintains a particular pension plan bears more relation to Congress' goals in enacting ERISA and its various exemptions, than the status of the entity which established the plan.

In any event, even if we agreed with Rose that the correct interpretation of § 1002(32) was *established and maintained*, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established *and* maintained by the LIRR.

Rose herself concedes that the Plan is maintained by the LIRR. The Plan is funded by the LIRR and administered by a five-person Board of Managers, the members of which are appointed by the LIRR Board of Directors. The Board of Managers reviews applications for pension benefits. In the case of employees covered by collective bargaining agreements (or their beneficiaries), review of an unfavorable benefits decision may be obtained from the Joint Board on Pension Applications. The Joint Board, in turn, is comprised of three members of the Board of Managers and two Union representatives named by the LIRR Labor Council.

Rose contends, however, that the Plan was not established by the LIRR, but by the Pennsylvania Railroad in 1938. When the Pennsylvania Railroad owned the LIRR,

it established the "Plan for Supplemental Pensions." In 1971, in fulfillment of its collective bargaining agreements, the LIRR replaced the Plan for Supplemental Pensions with the current "Long Island Rail Road Company Pension Plan" by amending the former plan in its entirety. The LIRR did not "terminate" the Plan for Supplemental Pensions, because termination of a plan triggers the immediate vesting of all accrued benefits and distribution of plan assets. *See* 26 U.S.C. § 411(d)(3); 26 C.F.R. § 1.401-6; *Donovan v. UMIC, Inc.*, 580 F. Supp. 1455 (S.D.N.Y. 1984). According to the IRS regulations, replacement of a plan with a comparable plan does not constitute a "termination." 26 C.F.R. § 1.401-6(b)(1).

Rose asserts that the LIRR Plan was not "established" by the LIRR within the meaning of ERISA, because the Plan for Supplemental Pensions was not formally "terminated." Defendants argue that Rose's interpretation is overly restrictive and inconsistent with the legislative purpose behind the governmental plan exemption.

Defendant's position is consistent with *Feinstein v. Lewis*, which held that a benefit plan was "established" by a governmental entity even though it was created pursuant to collective bargaining, rather than by statute or other unilateral government action. In *Feinstein*, the district court observed that "Congress, in exempting governmental plans, was concerned more with the governmental nature of public employees and public employers than with the details of how a plan was established or maintained." 477 F. Supp. at 1262.

We agree with defendants that under the facts of this case, where the LIRR was acquired by a public entity and its former pension plan was amended in its entirety, the

LIRR Plan was "established" by the LIRR. A broad reading of the term "established"—whereby a new plan may be established under ERISA without the preexisting one having been formally "terminated"—is more consistent with the legislative intent behind the governmental plan exemption.

CONCLUSION

The LIRR Plan under which Richard Rose was covered at the time of his death was both established and maintained for its employees by the Long Island Railroad Company. The LIRR is an agency or instrumentality of the MTA, which in turn is a political subdivision of the State of New York, within the meaning of 29 U.S.C. § 1002(32). We hold that when Mary Rose applied for benefits in 1976, the LIRR Plan was a governmental plan under 29 U.S.C. § 1003(b)(1) and therefore exempt from compliance with Title I of ERISA. The decision of the district court is hereby affirmed.

APPENDIX B

Opinion of the United States District Court for the Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

MARY ROSE, :

81 C 1835

Plaintiff, :

- against - :

L.I.R.R. PENSION PLAN, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

September 26, 1986
10:00 a.m.

B E F O R E :

HONORABLE HENRY BRAMWELL, U.S.D.J.

PETER CHARUKA
OFFICIAL COURT REPORTER

EASTERN DISTRICT COURT REPORTERS
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201
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THE COURT: I will put the Court's decision on the record.

This case, on remand pursuant to an order of the United States Court of Appeals for the Second Circuit, requires an interpretation of the "governmental plan" exemption from the Employee Retirement Income Security Act, 29 U.S.C. Section 1002(32) and 1003(b)(1) (ERISA). The relevant facts of the case are not in dispute, and are set forth in prior decisions of this Court and the Second Circuit.

On December 11, 1981, this Court granted defendant's motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, the Court finding that the Long Island Rail Road Pension Plan was a "governmental plan" as defined by Section 1002(32) of ERISA. On September 28, 1982, the Court

of Appeals for the Second Circuit reversed, holding that the LIRR Plan was not a governmental plan for the purposes of ERISA. However, on December 23, 1982, the Second Circuit granted rehearing of its September 28, 1982 decision, vacated that decision, and remanded to this Court for further consideration of the issue of whether the LIRR Plan falls within the "governmental plan" exemption contained in Section 1002(32) of ERISA. This morning, the parties cross-move for summary judgment.

Section 1002(32) defines a "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

After carefully considering the

voluminous submissions of the parties in connection with these motions, the Court is again convinced, as it was back in December of 1981, that the LIRR Plan is and has been at all times relevant to this case a "governmental plan" as defined by Section 1002(32) of ERISA. Although there still appears to be no case law directly on point, the Court is persuaded that judicial determinations of analogous federal statutes -- which appear on their faces to provide narrower exemptions than ERISA -- weigh heavily in favor of defendants' position in the present case. See, e.g., NLRB v. National Gas Utility District of Hawkins County, 402 U.S. 600 (1971)(interpreting the "political subdivision" exception to the Labor Management Relations Act); Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp., 547 F.2d 18 (2nd Cir. 1976),

cert. denied, 432 U.S. 906 (1977) (interpreting "political subdivision " exception to Title VII of the Civil Rights Act of 1964); Capers v. LIRR, 72 Civ. S 3168 Report & Recommendation of Magistrate Raby dated April 9, 1981) (finding the LIRR a "political subdivision" within the meaning of Title VII); Commissioner v. Shamberg's Estate, 144 F.2d 998 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945) (finding the Port Authority a "political subdivision" within the meaning of the Internal Revenue Code); Commissioner v. White's Estate, 144 F.2d 1019 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945) (finding the Triborough Bridge Authority a "political subdivision" within the meaning of the Internal Revenue Code).

Furthermore, the plain language and legislative history of the ERISA exemption, as cited by the parties, on balance points

decidedly to the conclusion that the LIRR Plan falls within the exemption. Finally, the Court is persuaded by the positions of the U.S. Department of Labor, the U.S. Department of Treasury, and the Pension Benefit Guaranty Corporation urging that the LIRR Plan be exempted from ERISA.

Considering the foregoing authority, along with all of the arguments and submissions of the parties, the Court again concludes that the LIRR is an agency of at least the Metropolitan Transportation Authority, and perhaps of the State of New York; that the MTA is a political subdivision of the State; and that the LIRR Pension Plan should therefore be exempt as a "governmental plan" within the meaning of Section 1002(32) of ERISA.

Accordingly, defendant's motion for summary judgment dismissing the complaint is

GRANTED, plaintiff's cross-motion for summary judgment is DENIED, and the case is DISMISSED.

Settle an order on notice on or before October 10, 1986.

(Conclusion of proceedings.)

APPENDIX C Original Opinion by Second Circuit Court of Appeals (later vacated)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1322—August Term, 1981

(Argued August 11, 1982 Decided September 28, 1982)

Docket No. 82-7026

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, et al.,

Defendants-Appellees.

Before:

VAN GRAAFEILAND and PIERCE, *Circuit Judges,* and MARKEY, *Chief Judge,* United States Court of Customs and Patent Appeals.*

Appeal from a judgment of the United States District Court for the Eastern District of New York, Henry

* Sitting by designation.

Bramwell, *J.*, finding that the Long Island Railroad Pension Plan is a "governmental plan" and thus exempt from compliance with the standards for participation and vesting imposed by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, and dismissing plaintiff's complaint for lack of subject matter jurisdiction.

Reversed and remanded.

JONATHAN WEISS, New York, New York (Legal Services for the Elderly, New York, New York; Edgar Pauk, of counsel), for *Plaintiff-Appellant.*

ROGER J. SCHIERA, Jamaica, New York (Angelo Granatelli, Jamaica, New York, of counsel), for *Defendants-Appellees.*

PIERCE, *Circuit Judge*:

Plaintiff Mary Rose is the widow of Richard Rose, who at the time of his death on January 7, 1976, was a Long Island Railroad ("LIRR") employee,[1] and a fully vested participant in the Long Island Railroad Pension Plan ("LIRR Plan" or "the Plan").[2] Although Richard Rose

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1 It is not claimed that Richard Rose's death was related to his employment—he died of leukemia.

2 Article II, § 7 of the LIRR Plan states that "[e]xcept as otherwise herein provided, an Employee who has accumulated at least 240 calendar months of Credit Service shall have a vested right to a Service-Age Pension under the terms of this Plan as in effect at that

had been eligible, since August 1975, to retire with a "service-age pension" based on his age and 26 years of service with the LIRR,[3] he never did so.

The LIRR adopted the LIRR plan in 1971 in order to fulfill its collective bargaining agreements and provide pensions for all of its employees. In 1974, the plan was amended to the form that was in effect at the time of Richard Rose's death.[4]

It is uncontested that Richard Rose did not at any time file the form necessary to elect the survivor option available under the LIRR Plan,[5] and that plaintiff's applica-

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time. Such Service-Age Pension shall not be payable prior to his retirement and attainment of age 50, and then only upon receipt of appropriate application therefor."

4 At the time of his death Richard Rose was 50 years old.

Article II, § 2 of the LIRR Plan provides, in pertinent part, as follows:

"SECTION 2. *Service-Age Pension Eligibility.* An employee shall be eligible to retire on a Service-Age Pension if:

(a) he has attained age 50 and has accumulated at least 240 calendar months of Credited Service."

4 Subsequent to Mr. Rose's death, the LIRR Plan was amended, and the survivor's benefits election provisions contained therein were altered. According to plaintiff, they are no longer in conflict with ERISA's requirements.

5 Article II of the LIRR Plan governs employees' eligibility for, and the vesting of, annuity, death, and disability benefits. Article II, § 8 of the LIRR Plan provides that once an employee's pension rights become vested, that employee may elect a "survivor option". If this option is elected, the annuity to which the employee is otherwise entitled is converted into a joint and survivor annuity of equal actuarial value. The employee will then receive a reduced monthly benefit, which, rather than terminating upon the employee's own death, will continue to be paid until the death of the employee's surviving spouse. Article II, § 8(d) of the LIRR Plan also provides that in order for an employee's election of the survivor option to be effective, it must be made in writing, on a designated form, at least 183 days prior to retirement. An election becomes effective on the first day

tion for survivor's benefits was denied by the Board of Managers of the LIRR Plan as a result of this failure. Plaintiff appealed the decision denying her these benefits, which she believed to be due to her as the surviving spouse of a vested participant in the LIRR Plan, to the Plan's Joint Board on Pension Applications. After the Joint Board affirmed the Board of Managers' decision, plaintiff filed the complaint in this action in the United States District Court for the Eastern District of New York. She contended therein, as she does in this Court, that the election provisions of Article II, section 8(d) of the LIRR Plan violated the express requirements of section 1055 of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA").[4] In short, she claimed that those provisions were invalid and could not

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of the month that follows the date six months after the required form is filed with the Board of Managers of the LIRR Plan. If an employee files a notice electing the survivor option but dies prior to its effective date six months later, the election is void. If, on the other hand, an employee dies after his election of the survivor option becomes effective but before he actually retires, his spouse will begin to receive benefits at the time of the employee's death. An election may be rescinded on 183 days notice, but may not be rescinded after the electing employee retires.

4 29 U.S.C. § 1055 provides, in pertinent part, that

> (a) If a pension plan provides for the payment of benefits in the form of an annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity.
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> • • •
>
> (c) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period . . . before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this subsection) not to take such joint and survivor annuity.

be invoked to deprive her of pension benefits which she contended were due to her as a surviving spouse.[7]

Defendants responded to the complaint by moving, pursuant to Rule 12(b)(6), Fed.R.Civ.P., for an order dismissing the case for lack of subject matter jurisdiction. They contended in their motion that the LIRR Plan was a "governmental plan" as that term is defined in section 1002(32) of ERISA, and that, as such, the LIRR Plan was exempt from the participation and vesting requirements applicable to pension plans governed by ERISA. After hearing argument on defendants' motion, and on plaintiff's cross-motion for summary judgment, the court below found that the LIRR Plan was a "governmental plan" under 29 U.S.C. § 1002(32). Therefore, the court found, the LIRR Plan was exempt from compliance with the ERISA provisions on which plaintiff based her claim. Consequently, the court denied plaintiff's motion for summary judgment, granted defendants' Rule 12(b)(6) motion, and dismissed plaintiff's complaint. Plaintiff appeals from that order.

The sole issue before the Court on this appeal is whether the district court was correct in its conclusion that the LIRR Plan is a "governmental plan" as that term is defined in section 1002(32) of ERISA. We believe that the district court was incorrect, and we reverse.

The LIRR

The LIRR was chartered in 1834 as a private stock corporation, the purpose of which was to provide freight

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[7] Plaintiff's complaint originally asserted claims under both ERISA and the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* ("LMRA"). The District Court found that the LIRR was not subject to the provisions of the LMRA and dismissed plaintiff's LMRA claims. Plaintiff does not appeal this disposition of the LMRA claims.

and passenger service to Long Island. In 1966, all of the LIRR's outstanding stock was acquired by the Metropolitan Transportation Authority ("MTA"), which used funds loaned to it by the State of New York to finance the purchase.

The MTA was created in 1965, pursuant to N.Y. Pub. Auth. L. § 1260 *et seq.*, in order to insure the "continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district." N.Y. Pub. Auth. L. § 1264(1). The MTA is, according to state law, "a body corporate and politic constituting a public benefit corporation." N.Y. Pub. Auth. L. § 1263(1)(a). Its members are appointed by the Governor of the State of New York with the advice and consent of the Senate. *Id.* It has the power, *inter alia,* to borrow money and issue bonds, N.Y. Pub. Auth. L. § 1265(3); to collect such fares and tolls as are necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis, N.Y. Pub. Auth. L. § 1266(3); to establish rules and regulations governing the conduct and safety of the public making use of MTA transportation facilities, which, in case of a conflict, supersede local laws, ordinances and regulations, N.Y. Pub. Auth. L. § 1266(4); to exercise, within certain limits, the state's power of eminent domain, N.Y. Pub. Auth. L. § 1266(9)(b); and to "acquire, hold, own, lease, establish, construct, . . . any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority. . . ." N.Y. Pub. Auth. L. § 1266(5). It was pursuant to this last power that the MTA acquired the LIRR.

Under New York law,

> [t]he directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation . . . shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority . . . . Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject.

N.Y. Pub. Auth. L. § 1266(5). Thus, the LIRR, as a wholly owned subsidiary of the MTA, has the same privileges and immunities as the MTA itself.

The employment relationship between the LIRR and its employees is also governed by the New York Public Authorities Law. Section 1265(9) of that law states that "no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a public employee." Although the MTA could have converted the LIRR into a public benefit corporation pursuant to N.Y. Pub. Auth. L. § 1266(5) at any time after its acquisition of the LIRR in 1966, it did not make this change until February, 1980, when it did so in the hope that the conversion would bring the LIRR's employees under the anti-strike provisions of N.Y. Civil Service Law § 210 ("the Taylor Law"). *United Transportation Union v. Long Island Rail Road Co.*, 71 L.Ed. 2d 547, 551 (1982). In addition, § 1266(5) of the New York Public Authorities Law states that "[t]he employees of any such subsidiary corporation [of the MTA], except those who are also employees of the authority, shall not be deemed employees of the authority." Thus, as the Supreme Court stated in *United Transportation Union*, at all times after the LIRR became a

wholly owned subsidiary of the MTA, "Railroad employees were not eligible for any of the retirement, insurance or job security benefits of state employees." 71 L.Ed. 2d at 556-57.

The "Governmental Plan" Exemption

Although ERISA applies to virtually all employee benefit plans established or maintained for the benefit of employees of employers "engaged in commerce or in any industry or activity affecting commerce", 29 U.S.C. § 1003(a), an employee benefit plan that is a "governmental plan" is exempt from the requirements of ERISA. 29 U.S.C. § 1003(b)(1). Title 29 U.S.C. § 1002(32), in turn, defines a "governmental plan" as "a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." Both plaintiff and defendants contend that the section 1002(32) definition of a "governmental plan" is clear and unambiguous, and neither requires, nor, in fact, allows for, any extensive exercise in statutory interpretation or analysis of the legislative history of ERISA. However, plaintiff and defendants are not in agreement as to what is the meaning of this allegedly clear and unambiguous statute. Plaintiff contends that the words, "the government of any State or political subdivision thereof," must be read together, and that these words mean that an employee benefit plan is not a "governmental plan" unless it is a plan established or maintained by the *government* of a state or by the *government* of a political subdivision of a state. Thus, the definition would include a plan maintained by the government of a city or township. An agency or instrumentality of a city government would also be included within the

definition by virtue of the "agency or instrumentality" language quoted above. However, plaintiff argues, the definition does not include the LIRR, because it is not itself the *government* of either a state or a political subdivision of a state. Neither is it an "agency or instrumentality" of a *government* of a state or of a political subdivision of a state, since the MTA, even if it *is* a political subdivision of a state, is *not* the *government* of a state or of a political subdivision of a state.[8]

Defendant contends, on the other hand, that plaintiff's reading of the statutory definition of "governmental plan" is narrow, "tortured", and "fanciful". Defendants argue that the statutory definition must be read disjunctively, and that it clearly includes a political subdivision of the government of a state; that the MTA is a political subdivision of the State of New York; and that the LIRR is, at minimum, an "agency or instrumentality" of the MTA.[9] Thus, defendants claim, the LIRR falls squarely within the section 1002(32) definition of a "governmental plan".

Even if defendants are correct as to the proper reading of section
1002(32), their argument cannot succeed unless the MTA, or the LIRR, or both, are political subdivisions of the State of New York. Defendants state correctly in this regard that the determination as to whether or not these entities are political subdivisions within the meaning of ERISA, a federal statute, is governed by federal, rather

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8 Plaintiff does not deny that the MTA probably does fall within the § 1002(32) definition, since the MTA would appear to be an agency or instrumentality of the government of the State of New York.

9 Defendants also argue that the LIRR itself is a political subdivision of New York State, but acknowledge that the district judge found only that the LIRR was an agency or instrumentality of the MTA.

than state law. *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 602-03 (1971) ("*Hawkins*"); *Popkin v. New York State Health & Mental Hygiene Facilities Improvement Corp.*, 547 F.2d 18, 19 (2d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977); *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 63 (4th Cir. 1965). Defendants refer us to the National Labor Relations Board and Equal Employment Opportunity Commission criteria for defining an employer as a political subdivision.[10] Application of these criteria does, as

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[10] Under the National Labor Relations Board's ("NLRB") criteria, an employer is within the "political subdivision" exemption from the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("NLRA"), if (1) it was created directly by the state so as to constitute a department or administrative arm of the government, or (2) it is administered by individuals who are responsible to public officials or to the general electorate. *NLRB v. Natural Gas Utility District of Hawkins County, Tenn.*, 402 U.S. 600, 602-03 (1971). In *Hawkins* the Supreme Court applied these criteria to determine whether a local utility district was exempt from the coverage of the NLRA, without explicitly approving their use in other cases.

Applying the NLRB criteria, the MTA clearly is a political subdivision of the State of New York. The MTA was created by N.Y. Pub. Auth. L. § 1263(1)(a). The Public Authorities Law states, in § 1264(2), that the MTA's "purposes are in all respects for the benefit of the people of the state of New York," and that "the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title." In addition, the MTA is administered by board members who are both appointed by, and subject to removal by a public official, the Governor of New York. N.Y. Pub. Auth. L. §§ 1263(1), (7). Since the LIRR is administered by the same board members as is the MTA, N.Y. Pub. Auth. L. § 1266(5), it too would seem to be a political subdivision under the NLRB criteria. However, this finding is not dispositive of whether the LIRR is a "political subdivision" within the terms of ERISA. The NLRB criteria reflect the NLRB's "familiarity with labor problems and its experience in the administration of the [NLRA]." *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60, 62 (4th Cir. 1965). The NLRB has no such expertise in relation to ERISA. The NLRB criteria also reflect a clear Congressional intent to except the labor relations of federal, state, and local governments, whose employees "did not usually enjoy the right to strike" from coverage by the NLRA. *Hawkins, supra*, 402 U.S. at 604. *See also Crilly v. South*

defendants contend, lead to the conclusion that both the LIRR and the MTA are political subdivisions. However, because neither the National Labor Relations Board nor the Equal Employment Opportunity Commission is an expert agency with regard to the participation and vesting requirements imposed by ERISA, we are not persuaded that the National Labor Relations Board criteria are applicable to the determination of what constitutes a "political subdivision" within the terms of ERISA. However, we believe, in any case, that the language of 29 U.S.C. § 1002(32) is ambiguous, and that it may well be that plaintiff is correct in her assertion that if the LIRR is to fall within the statutory definition of a governmental subdivision it must be either "the *government* . . . of a political subdivision," or an "agency or instrumentality" of such a *government.*[11] Therefore, we need not further examine and rule as to whether the LIRR is a "political subdivision" for purposes of ERISA. Instead, we must look on the one hand, to the legislative history and other sources for evidence of the Congressional intent as to the coverage of ERISA, and on the other hand, to the characteristics of the LIRR Plan, and of the LIRR as an employer, in order to determine whether Congress would have intended that ERISA cover the Plan involved in this case.

ERISA

Congress' primary purpose in passing ERISA was to protect individual pension rights. H.R. Rep. No. 533, 93d

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Eastern Penn. Transportation Auth., 529 F.2d 1355, 1360 (3d Cir. 1976). No such concern is relevant when interpreting exclusions from the coverage of ERISA.

[11] Defendants do not contend that either the MTA or the LIRR is a government.

Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4639. The House Report which recommended passage of the bill stated that, "[i]ts most important purpose will be to assure American workers that they may look forward, with anticipation, to a retirement with financial security and dignity, and without fear that this period of life will be lacking in the necessities to sustain them as human beings within our society." *Id., reprinted in* [1974] U.S. Code Cong. & Ad. News at 4646. In addition, "[m]embers of the families of employees are included in the class which ERISA protects . . . . Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the families of those workers who depend to the same degree on the actual availability of those benefits." *Stone v. Stone,* 450 F. Supp. 919, 926 (N.D. Cal. 1978), *aff'd,* 632 F.2d 740 (9th Cir. 1980), *cert. denied,* 453 U.S. 922 (1981). ERISA is thus a remedial statute, the coverage of which should be liberally construed, and exemptions from which should be confined to their narrow purpose. S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4854, 4854; *Connolly v. Pension Benefit Guaranty Corp.,* 581 F.2d 729, 732 (9th Cir. 1978), *cert. denied,* 440 U.S. 935 (1979).

The governmental plan exemption was incorporated into ERISA for several somewhat conflicting reasons. On the one hand, the enactment of minimum vesting and funding standards applicable to public plans was thought to be unnecessary since public plans were generally known to be generous with regard to vesting. Further, since "[s]tate and local governments and their taxing authority will be with us forever," H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong.

& Ad. News at 4667, the funding of public plans was generally regarded as adequate and secure. *Id.*; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4756, 4830. On the other hand, since some governmental units had made generous pension plan promises, but had actually set aside very little money to pay these benefits, there was concern that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden for taxpayers. H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4756. Because of this concern with possible underfunding, and the possibility that imposing ERISA standards would entail unacceptable cost implications for governmental entities, the House Committees on Ways and Means and on Education and Labor, and the Senate Committees on Finance and on Labor and Public Welfare were directed to study the extent to which the enactment of federal legislation and standards with respect to governmental employee benefit plans would be desirable. H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4670, 4713; H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4647; 29 U.S.C. § 1231. To a certain extent both of the above concerns, and particularly the latter, are concerns of federalism: Congress was reluctant to impose possibly onerous standards on local governmental bodies which have their own peculiar local concerns and legislative processes with which to contend. *See Feinstein v. Lewis,* 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979), *aff'd,* 622 F.2d 573 (2d Cir. 1980); H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4639, 4647.

Because of the relationship between the LIRR and the State of New York, and because, under New York law, LIRR employees are not state employees, a holding that the LIRR Plan is not exempted from the vesting and participation requirements of ERISA will not implicate any of the concerns that led Congress to exempt governmental employee benefit plans from ERISA coverage. First, the LIRR Plan, and thus, LIRR employees, lack the protections that would be available if LIRR employees were considered state employees, and that would be available if the LIRR had the taxing power which Congress assumed would be available to meet the funding obligations of governmental plans exempted from ERISA coverage. For example, the New York Constitution, Art. 5, § 7, protects state employees from the loss of pension benefits. It provides that, "[a]fter July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." Under the LIRR Plan, however, provision is made for modification or termination of the Plan, and for the distribution of reduced benefits to Plan participants in case of such an event. *See* Article VIII of the LIRR Plan. In addition, the survivors of LIRR employees are ineligible for the state employee's survivor's benefits provided for in New York State Civil Service Law § 154.

Further, no statutory provision requires the State of New York to pay any LIRR operating deficits or other obligations (including pension plan obligations), that the LIRR is unable to meet. In fact, the MTA and its subsidiaries are directed to charge such fares, rates and tolls as are necessary to maintain the entire system on a self-sustaining basis. N.Y. Pub. Auth. L. § 1266(3).

This lack of any obligation on the part of New York State to fund any deficit in the LIRR's budget renders the second concern of Congress—that imposition of ERISA's standards would unduly burden local governments and their taxpayers—inapplicable to the LIRR Plan. In addition, the reluctance to tamper with the various nuances of state and local legislative processes is not relevant where a pension plan, like the LIRR plan, is the product of collective bargaining rather than of statutory enactment. Finally, concerns of federalism and of the possibility that regulation will endanger the "separate and independent existence" of a state, *National League of Cities v. Usery*, 426 U.S. 833, 851 (1976), are simply irrelevant in a context in which a state denies that the employees involved are governmental employees at all.

The result of the decision below is to deprive plaintiff of the protections of ERISA on the basis that the LIRR Plan is a "governmental plan", while at the same time it is clear that under the laws of the State of New York plaintiff's husband was not a government employee, and therefore was not entitled to any of the rights or protection that would have accompanied such employment. Such a result is inconsistent with the remedial intent of Congress in passing ERISA.

We hold therefore, on the facts of this case, that the LIRR Plan is subject to the participation and vesting requirements of ERISA, and reverse the district court's order dismissing plaintiff's complaint for lack of subject matter jurisdiction. We need not, and do not, reach the question of whether the election provisions contained in Article II, § 8 of the LIRR Plan are invalid in light of 29 U.S.C. § 1055.

Reversed and remanded for further proceedings consistent with this opinion.

APPENDIX D

Order of the Court of Appeals for the Second Circuit Denying Petition for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Ciruit, held at the United States Courthouse, in the City of New York, on the 20th day of October, one thousand nine hundred and eight-seven.

86-7942

----------x

MARY ROSE,

Plaintiff-Appellant,

-v-

LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, as members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, as members of the Plan Board of Managers, and the Joint Board on Pension Applications, E. YULE, W. STYZIAK, and J. BOVE as members of the Joint Board on pension Applications, and the LONG ISLAND RAILROAD,

Defendants-Appellees.

----------x

(Filed October 20, 1987, Elaine B. Goldsmith, Clerk)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant Mary Rose.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/_____
Elaine B. Goldsmith
Clerk

APPENDIX E: Relevant Constitutional and Statutory Provisions

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

(1) 29 U.S.C. § 1001 et seq.

SUBCHAPTER 1 - PROTECTION OF EMPLOYEE BENEFIT RIGHTS

Subtitle A - General Provisions

§ 1001. Congressional findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the

successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues

of the United States because they are afforded preferential Federal tax treatment; tha despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable

character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the

soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1002. Definitions

For purposes of this subchapter:

....

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

....

(32) The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or

political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies, and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation under the provisions of the International Organizations Immunities Act.

§ 1003. Coverage

....

(b) The provisions of this subchapter shall not apply to any employe benefit plan if -

(1) such plan is a governmental plan (as defined in section 1002(32) of this title):

§ 1055. Joint and survivor annuity requirement

Form of payment of annuity benefits

(a) If a pension plan provides for the payment of annuity, such plan shall provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annity.

....

Election to take annuity

(e) A plan shall not be treated as satisfying the requirements of this section unless, under the plan, each participant has a reasonable period (as prescribed by the Secretary of the Treasury by regulations) before the annuity starting date during which he may elect in writing (after having received a written explanation of the terms and conditions of the joint and survivor annuity and the effect of an election under this

subsection) not to take such joint and survivor annuity.

§ 1231. Congressional study

(a) The Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Such study shall include an analysis of-

(1) the adequacy of existing levels of participation, vesting, and financing arrangements,

(2) existing fiduciary standards, and

(3) the necessity for Federal legislation and standards with respect to such plans.

In determining whether any such plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as the taxing power of the government maintaining the plan.

§ 1321. Plan covered

(a) Except as provided in subsection (b) of this section, this section applies to any plan (including a successor plan) which, for a plan year-

....

(b) This section does not apply to any plan-

....

(2) established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing, or to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act,

....

(2) 26 U.S.C. § 414(d)

§ 414. Definitions and special rules

(d) Governmental plan. - For purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. The term "governmental plan" also

includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and which is financed by contributions required under that Act and any plan of an international organization which is exempt from taxation by reason of the International Organizations Immunities Act (59 Stat. 669).

NEW YORK CONSTITUTION

Article V, Section 7

After July first, nineteen hundred forty, membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

NEW YORK PUBLIC AUTHORITIES LAW

§ 1265. General powers of the authority

Except as otherwise limited by this

title, the authority shall have power.

....

9. (a) Notwithstanding section one hundred thirteen of the retirement and social security law or any other general or special law, the authority and any of its subsidiary corporations may continue or provide to its affected officers and employees any retirement, disability, death or other benefits provided or required for railroad personnel pursuant to federal or state law. Nothwithstanding any provisions of the civil service law, no officer or employee of a subsidiary corporation of the authority, other than a public benefit subsidiary corporation, shall be a public officer or a pubic employee;

(b) The authority and any of its public benefit subsidiary corporations may be a

"participating employer" in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such public benefit subsidiary corporation, as may be provided by resolution of such authority or any such public benefit subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In talking any action pursuant to this paragraph (b), the authority and any of its public benefit subsidiary corporations shall consider the coverage and benefits continued or provided pursuant to paragraph (a) of this subdivision.

§ 1266. Special powers of the authority

In order to effectuate the purposes of this title:

....

3. The authority may establish, levy and collect or cause to be established, levied and collected and, in the case of a joint service arrangement, join with others in the establishment, levy and collection of such fares, tolls, rentals, rates, charges and other fees as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or by a subsidiary corporation of the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be estab-

lished and changed only if approved by resolution of the authority adopted by not less than a majority vote of the whole number of members of the authority then in office, with the chairman having one additional vote in the event of a tie vote, and only after a public hearing, provided however, that fares, tolls, rentals, rates, charges or other fees for the transportation of passengers on any transportation facility which are in effect at the time that the then owner of such transportation facility becomes a subsidiary corporation of the authority or at the time that operation of such transportation facility is commenced by the authority or is commenced under contract, lease or other arrangement, including joint service arrangements, with the authority may be continued in effect without such a hearing. Such fares, tolls, rentals, rates, charges

and other fees shall be established as may in the judgment of the authority be necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis. The said operations shall be deemed to be on a self-sustaining basis as required by this title, when the authority is able to pay or cause to be paid from revenue and any other funds or property actually available to the authority and its subsidiary coprorations (a) as the same shall become due, the principal of and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, together with the maintenance of proper reserves therefor, (b) the cost and expense of keeping the properties and assets of the authority and its subsidiary corporations in good condition and repair, and (c) the capital and operating expenses of the

authority and its subsidiary corporations. The authority may contract with the holders of bonds and notes with respect to the exercise of the powers authorized by this section. No acts or activities taken or proposed to be taken by the authority or any subsidiary of the authority pursuant to the provisions of this subdivision shall be deemed to be "actions" for the purposes or within the meaning of article eight of the environmental conservation law.

.....

5. The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority and

may transfer to or from any such corporation any moneys, real property or other property for any of the purposes of this title. The directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority,

shall not be deemed employees of the authority.

....

Historical note

....

Subd. 5. Amended L.1966, c. 415, § 5, eff. May 23, 1966, retroactive to Jan. 20, 1966.

L.1966, c. 415, § 5, among other changes, granted powers to subsidiary corporations and empowered the authority to create a public benefit corporation of one or more of its subsidiary corporations.

§ 1269. Notes and bonds of the authority

....

8. The state shall not be liable on notes or bonds of the authority and such

notes and bonds shall not be a debt of the state, and such notes and bonds shall contain on the face thereof a statement to such effect.

APPENDIX F: Letters from New York State Comptroller to petitioner's counsel

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

MARVIN G. NAILOR
PRESS SECRETARY

June 5, 1984

Mr. Edgar Pauk
Legal Services for the Elderly
132 West 43rd St., 3rd floor
New York, New York 10036

Dear Mr. Pauk:

In response to your Freedom of Information request of May 29, 1984 the Office of the State Comptroller does not store any documents relating to private pension plans.

It is our understanding that every private pension plan must file a summary description with the U. S. Department of Labor in Washington, D.C. If you would contact that office, you might be able to obtain specific information on the Long Island Rail Road.

Sincerely,

/s/ Karen R. Collen
Karen R. Collen
Asst. Records Access Officer

PO:mc

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

MARVIN G. NAILOR
PRESS SECRETARY

June 13, 1984

Mr. Edgar Pauk
Legal Services for the Elderly
132 West 43rd St., 3rd floor
New York, New York 10036

Dear Mr. Pauk:

In follow-up of your May 29, 1984, Freedom of Information request and subsequent call to this office, I am informed by the Division of Retirement that the Comptroller has not issued an opinion to the Long Island Rail Road (LIRR) on the subject of the funding of its pension plan.

Also, as we discussed, the LIRR is not a participating employer in the Employees Retirement System. We suggest again that you contact the U.S. Department of Labor in Washington, D. C. should you wish to obtain information about the LIRR pension plan.

Sincerely,

/s/ Karen R. Collen
Karen R. Collen
Asst. Records Access Officer

KRC:mc

(2)

No. 87-1232

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARY ROSE,

Petitioner,

—against—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSION APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK, as Trustee of the Plan, T. P. MOORE and JOHN DOE, As members of the Plan's Board of Managers, T. M. TARANTO, J. B. HUFF and H. J. LIBERT, As members of the Plan's Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications, and THE LONG ISLAND RAILROAD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Deputy General Counsel

THE LONG ISLAND RAIL ROAD COMPANY

February 13, 1988

*Counsel of Record

89 p11

Counter-Statement of the Question Presented

Whether certiorari should be granted to review the decision of the United States Court of Appeals for the Second Circuit that The Long Island Rail Road Company Pension Plan (the "Plan"), established and maintained by the State-owned and operated The Long Island Rail Road Company (the "LIRR"), is a "governmental plan" within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* and § 1002(32) ("ERISA") where (1) the LIRR, the Members of which are appointed by the Governor of the State of New York, is wholly owned by, and statutorily has all the governmental privileges, immunities and exemptions of, the Metropolitan Transportation Authority (the "MTA"), a public authority created by the State of New York expressly to acquire the LIRR to perform "essential governmental functions", (2) the concerns that led Congress to exempt governmental pension plans from ERISA, namely (a) that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden for taxpayers and (b) that funding of public plans was regarded as adequate and secure because of governmental taxing authority, apply squarely to the LIRR because it depends for its existence on regularly mandated and substantial State, federal and local governmental funding, (3) all of the United States expert agencies responsible for interpreting and enforcing ERISA (the Departments of Justice and Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation), as well as the State of New York have urged vigorously in *amicus curiae* submissions in this action that the Plan is a "governmental plan" and (4) the Court of Appeals' decision is wholly consistent with ERISA's language and legislative history, Supreme Court precedent, the opinions and rulings of the expert agencies and does not conflict with the decision of any other federal Court of Appeals?

List of Parents, Subsidiaries and Affiliates

The LIRR is, and since 1966 has been, wholly owned by the MTA, a public authority of the State of New York. The MTA also wholly owns other governmental entities, including the Metro-North Commuter Railroad Company, Staten Island Rapid Transit Operating Authority and Metropolitan Suburban Bus Authority, which enjoy the same governmental powers, privileges and immunities as the MTA and the LIRR and which, like the LIRR, are responsible for key commuter transportation facilities in the New York metropolitan area. Members of the MTA's Board are the sole Members of these entities, and also are the sole Members of the New York City Transit Authority and the Triborough Bridge and Tunnel Authority. N.Y. Pub. Auth. Law § 1264 (1).*

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* This brief is submitted on behalf of all respondents except Yule, Styziak and Bove, who are named as representatives of certain unions representing employees of the LIRR and who have taken no position here. Morgan Guaranty Trust Company of New York ("Morgan Guaranty"), a former trustee of the LIRR Plan, is not a real party in interest in this action. In compliance with Supreme Court Rule 28.1, however, the most recent Form 10-K filed with the Securities and Exchange Commission provides that Morgan Guaranty is a wholly owned subsidiary of J.P. Morgan & Co. Incorporated.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

Petitioner alleges that the Plan violated the requirements of section 205 of ERISA, 29 U.S.C. § 1055, because it did not contain the precise automatic annuity benefit provisions man-

dated for ERISA-covered pension plans.[1] The Plan instead required that a Plan participant affirmatively elect survivorship benefits.

The LIRR contends that the Plan is a "governmental plan" under 29 U.S.C. §§ 1003(b) and 1002(32) and as such is not subject to ERISA's survivorship and funding requirements, among many others. As discussed more fully below, the LIRR, which performs an "essential governmental function" (N.Y. Pub. Auth. Law § 1264), is wholly owned by the MTA and enjoys all of the MTA's governmental privileges, powers, immunities and exemptions, including, among others, the power of eminent domain, exemption from taxes and police powers. The LIRR depends for its existence on regular, mandated and substantial State, federal and local funding.

Petitioner is the surviving spouse of Richard Rose, a former LIRR employee who died in 1976. He died prior to retiring, not having filed papers electing survivorship annuity benefits under the Plan for his spouse.

The LIRR established the Plan and The Long Island Rail Road Company Plan for Additional Pensions (collectively "the Plans") in 1971 pursuant to collective bargaining agreements between the LIRR and unions representing LIRR employees. The Plan replaced a fundamentally different plan covering primarily management employees called The Long Island Rail Road Company Plan for Supplemental Pensions. In 1974, the Plan was amended to the form that was in effect at the time of Mr. Rose's death.

Under the Plan, Mr. Rose had the right from August 1975 onward to receive a "service-age pension" payable monthly for his life without survivorship benefits or to elect that a pension be paid after his death to his surviving spouse. Had he made

---

1 Rose previously brought an action in New York Supreme Court, Queens County, alleging similar underlying facts and requesting similar relief under state law claims. That action essentially has been dormant since this action was commenced.

such an election, the monthly benefits payable for his life would have been actuarially reduced to reflect the payments due to his surviving joint annuitant. By not electing a survivorship annuity, Mr. Rose's monthly pension benefits would have been higher.

Following Mr. Rose's death, Rose applied for survivorship benefits. Because her husband never elected a survivorship option, her application for survivorship benefits was denied.[2]

Following four years of extensive discovery after a remand from the Court of Appeals,[3] including seven depositions of defendants and non-parties, five sets of interrogatories and five document requests, the LIRR moved for summary judgment on April 11, 1986, contending that the Plan was a governmental plan exempt from the requirements of Title I of ERISA. Rose cross-moved for summary judgment on June 20, 1986. By decision rendered September 26, 1986, the District Court granted defendants' summary judgment motion, denied Rose's cross-motion and dismissed the complaint, holding that the Plan was a "governmental plan" exempt from ERISA's requirements.

On appeal, at the express request of the Second Circuit, the United States Department of Justice, the United States Department of Labor, the Internal Revenue Service and the Pension Benefit Guaranty Corporation, all of the expert agencies charged with enforcing, interpreting and administering ERISA, submitted a brief as *amicus curiae*, in which they vigorously and unequivocally urged that ERISA's statutory language, its legislative history, their own administrative opinions and rulings and judicial precedent from this Court and other courts compel the conclusion that the Plan is a "governmental plan" and, therefore, is exempt from the Title I requirements of ERISA. Indeed, the Government noted that:

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2 Rose concedes that if the Plan is a "governmental plan" within the meaning of ERISA, dismissal of the complaint is required.

3 The full procedural history is set forth in the Second Circuit's decision, *Rose v. The Long Island Railroad Pension Plan*, 828 F.2d 910, 912-13 (2d Cir. 1987).

> "this case does not present a borderline question. The governmental ownership, control, funding and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York and the MTA." (Government Br. at 17) (19a)

The State of New York, which earlier had sought to intervene in the action as a defendant, also made an *amicus* submission urging that the Plan is a governmental plan.[4]

By unanimous published decision dated September 3, 1987 (reported at 828 F.2d 910), the Second Circuit affirmed the District Court's decision, holding that the Plan, established and maintained for its employees by the LIRR, at all relevant times was a governmental plan and therefore exempt from Title I of ERISA because the LIRR is an agency or instrumentality of the MTA, which in turn is a political subdivision of the State of New York within the meaning of 29 U.S.C. §§ 1002(32) and 1003(b)(1).

Reasons Why the Petition Should Be Denied

The Second Circuit's decision, based on an undisputed record, conforms fully to and is guided by this Court's holding in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 603-05 (1971), and the leading Second Circuit decisions in *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert.*

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4 A copy of the *amicus curiae* brief submitted by these expert agencies is annexed as Appendix A (the "Government Br."). A copy of the letter submitted by the State of New York as *amicus curiae* is annexed as Appendix B.

In a March 1, 1977 National Office Technical Advice Memorandum, annexed as Appendix C, the Internal Revenue Service concluded that the LIRR is an agency or instrumentality of the MTA, which is a political subdivision of the State, and that therefore the Plan is a "governmental plan."

denied, 323 U.S. 792 (1945), and all of the relevant rulings and opinions of the expert United States agencies. None of these cases, rulings or opinions is even cited by petitioner. Further, the Second Circuit's decision does not conflict with any decision of any other federal Court of Appeals, another point not disputed by petitioner. Finally, the Second Circuit's decision does not raise an important federal question which must be decided by this Court; it involves the interpretation of a limited definitional provision of ERISA in a limited factual context. As clearly set forth in the Second Circuit's decision and in the Government's brief, ERISA's statutory language and legislative history and all relevant administrative and judicial precedent firmly support the conclusion that the Plan is a governmental plan and therefore is exempt from the Title I requirements of ERISA.

Summary of Argument

The Plan is a "governmental plan" because:

(1) As the Second Circuit held, the LIRR is at least an agency or instrumentality of the MTA, which itself is a political subdivision within the meaning of 29 U.S.C. § 1002(32). Among other things: (a) the LIRR is, and since 1966 has been, a wholly owned subsidiary of the MTA; (b) the LIRR statutorily has all of the extensive governmental privileges, powers, immunities and exemptions of the MTA; (c) when it created the MTA expressly to acquire the LIRR, the New York Legislature declared the LIRR to be an entity of "vital importance" performing an "essential governmental function"; (d) the Members of the governing board of the LIRR, who by law are the same as the Members of the MTA, are appointed by the Governor with the advice and consent of the Senate; (e) the LIRR has the power to make rules superseding local government regulations; (f) the LIRR has its own police force with powers equal to state, county and municipal police; (g) the LIRR has the power of eminent domain, is exempt from local regulations and taxes and has a host of other governmental

powers; and (h) the LIRR depends for its very existence on regularly mandated and substantial State, federal and local funding. No "private" entity has these attributes or this background. Petitioner does not and cannot counter these conclusive and dispositive facts.

(2) Precedent of this Court and of the Second Circuit support a finding (see *infra* at 15-17), and the consistent opinions and rulings of all of the expert United States agencies charged with responsibility for the administration and interpretation of ERISA all have concluded (see *infra* at 13-15), that plans similar to the LIRR's Plan are "governmental plans". Most significantly, the United States Department of Justice, the United States Secretary of Labor, the United States Secretary of the Treasury (and the Internal Revenue Service) and the Pension Benefit Guaranty Corporation expressly have urged in this action that the Plan is a "governmental plan".

(3) The concerns that led Congress to exempt governmental entities' employee benefit plans, are: (a) that the sudden imposition of a minimum funding requirement could create a considerable, and unreasonable, burden on taxpayers and (b) that funding of public plans was generally regarded as adequate and secure because of governmental taxing authority. These Congressional concerns apply squarely to the LIRR because of the LIRR's dependence on regular, substantial and mandated State, federal and local governmental funding it needs to survive.

(4) The financial impact of a decision holding that the Plan is not a "governmental plan" would be devastating to the LIRR, the State of New York and, ultimately, the taxpayers and would have a disastrous impact nationwide on a multitude of plans similar to the LIRR's that also are operating under the well-founded belief that they are "governmental plans". Keeping the taxpayer shielded from that kind of burden is precisely why Congress exempted governmental plans from most of ERISA's requirements.

Argument

I.

THE SECOND CIRCUIT'S DECISION WAS CORRECT AND DOES NOT MERIT PLENARY REVIEW

1. The Second Circuit Correctly Held that a Retirement Plan Is Exempt from Title I of ERISA if It Is Established or Maintained by (1) the Government of a State, (2) a Political Subdivision of a State or (3) an Agency or Instrumentality of Any of the Foregoing

The sole issue before the Second Circuit was whether the Plan qualifies as a "governmental plan" under Title I of ERISA. No new issue is raised here.

The term "governmental plan" is defined in 29 U.S.C. § 1002(32), which provides in pertinent part:

> "The term governmental plan means a plan established or maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

Based on the plain statutory language and the legislative history of ERISA, the Second Circuit concluded, in harmony with all relevant prior rulings and determinations as well as the Government Brief, that a pension plan qualifies as a "governmental plan" under ERISA if it is established (1) by the government of a state, (2) by a political subdivision of a state, or (3) by an agency or instrumentality of a state or of a political subdivision of a state. 828 F.2d at 914-15.

Rose argues that the phrase "by the government of any State or political subdivision thereof" in the definition of a "governmental plan" should be interpreted as meaning the government of any state or the *government* of a political subdivision of a state or the agency or subdivision of one of these governments. Cert. Petition at 12-16. There is absolutely no precedent—in

case law, ERISA's legislative history or administrative rulings—for petitioner's hyper-restrictive reading of the statute. The Second Circuit rejected petitioner's interpretation, sensibly concluding that "[i]f, as Rose maintains, Congress enacted the exemption primarily to protect the autonomy of state and local governments, then it would not make sense to extend the exemption to state agencies and instrumentalities—which are not governments—while denying the exemption to public authorities." 828 F.2d at 914. The Government comes to the same conclusion (Government Br. 13-17) (16a-19a).[5]

The Second Circuit also noted that in ERISA § 3031(a), *originally codified at* 29 U.S.C. § 1231(a), Congress directed further study of plans exempt from ERISA, including:

> "retirement plans established and maintained or financed (directly or indirectly by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing."

ERISA § 3031(a), *originally codified* at 29 U.S.C. § 1231(a), *quoted in* 828 F.2d at 915.

As the Second Circuit concludes, ERISA § 3031(a) "clearly encompasses *all* political subdivisions of states, whether or not they are *governments*. The clear language of [ERISA § 3031(a)] thus provides an additional way to interpreting the ambiguous language of 29 U.S.C. § 1002(32)." 828 F.2d at 915 (emphasis in original).

The Second Circuit also analyzed the legislative history of ERISA, noting that the "governmental plan" exemption "is in

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5 Alternatively, and as recognized by the Government, this "*government* of a state" or "*government* of a political subdivision" argument can be avoided altogether because the LIRR is "an agency or instrumentality" of the State itself in addition to being an agency or instrumentality of the MTA (*see* Government Br. at 20) (21a). The Second Circuit did not need to reach this point because it agreed with the LIRR's interpretation of the ERISA governmental plan definition. 828 F.2d at 914-15.

part based on principles of federalism" and that the governmental plan exemption was instituted to avoid interfering with the "literally thousands of public employees retirement systems operated by towns, counties, *authorities* and cities in addition to the state and Federal plans." H.R. Rep. No. 533, 1974 U.S. Code Cong. & Ad. News at 4647 (emphasis added), *quoted in* 828 F.2d at 914. Accordingly, the Second Circuit held that the "governmental plan" exemption applies to agencies or instrumentalities of political subdivisions of states.

2. The LIRR Plan Is Established and Maintained by a Governmental Entity

a. *The Statutory Powers of the LIRR*

The symbiotic relationships between and among New York State, the LIRR and the MTA, which are controlling as to whether the Plan is a "governmental plan", are largely fixed by statute:

1. In 1965, the MTA, then called the Metropolitan Commuter Transportation Authority, was created by the New York State Legislature for the express purpose of acquiring the LIRR and continuing its operations in order to preserve, strengthen and improve commuter services which constitute an "essential public purpose" of "vital importance" to the welfare of the People of New York State. 1965 N.Y. Laws, ch. 324; *see* N.Y. Pub. Auth. Law §§ 1260 *et seq*. The Legislature issued findings and declarations with respect to the acquisition of the LIRR, including the following:

> (a) "Efficient and adequate transportation of commuters within the New York metropolitan area is of vital importance to the commerce, defense and general welfare of the New York metropolitan area, the state, and the nation." 1965 N.Y. Laws ch. 324, § 1 at ¶ 1.
>
> (b) "The continued deterioration of the financial situation and physical condition of the Long Island Rail Road . . . constitutes a serious threat to the economic well-being of the state." *Id.* at ¶ 2.

(c) "The urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of persons in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services." *Id.* at ¶ 6.

(d) "It is declared to be the policy of the state that the preservation, strengthening and improvement of commuter services is an essential public purpose, and that it is in the public interest for the state and its political subdivisions, in cooperation with other levels of government, to take appropriate measures and assume responsibilities for the preservation of such essential services." *Id.* at ¶ 8.

2. In 1966, the MTA acquired the LIRR, by purchasing all of its stock, with $65 million loaned by the State of New York. No private individual or entity has held any beneficial interest in the LIRR since that time.

3. The loan of $65 million loan was not repaid from operating revenue, but by a 1967 State bond issue, a portion of the proceeds of which was appropriated to the MTA to "repay" the loan. 1967 N.Y. Laws ch. 715, § 1(b), ch. 718.

4. The Legislature declared that the MTA and the LIRR perform an "*essential governmental function*" in carrying out their purpose on behalf of the State of New York. Those purposes are to continue, develop and improve commuter transportation within the Metropolitan Commuter Transportation District. N.Y. Pub. Auth. Law § 1264 (emphasis added).

5. The MTA "may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more [of its] wholly-owned subsidiary corporations. . . . Each subsidiary corporation of the MTA [including the LIRR] and any of its property, func-

tions and activities have all of the privileges, immunities, tax exemptions and other exemptions of the [MTA itself] and of the [MTA's] property, functions and activities." N.Y. Pub. Auth. Law § 1266(5).

6. Since its acquisition by the MTA in 1966, the LIRR has had all the statutory privileges, immunities and exemptions of the MTA, N.Y. Pub. Auth. Law § 1266(5), including the following:

(a) The MTA, the LIRR and their property are exempt from New York State and local taxation. N.Y. Pub. Auth. Law § 1275.

(b) The MTA and the LIRR have the power of eminent domain. N.Y. Pub. Auth. Law § 1267.

(c) The facilities, activities and operations of the MTA and the LIRR are not under the jurisdiction of any municipality or political subdivision, including any county, city, village, or town, school or other district, and are not subject to any local or municipal laws and ordinances that conflict with either the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law §§ 1260 *et seq.*, or the rules and regulations of the MTA or the LIRR. N.Y. Pub. Auth. Law § 1266(8).

(d) The MTA and the LIRR have the right to make rules that supersede local regulations, violations of which are punishable by fine or imprisonment. N.Y. Pub. Auth. Law § 1266(4) & (5).

(e) The MTA and the LIRR are immune from town zoning and building regulations with respect to the operation of railroad stations for the "governmental purpose of public transportation." New York State Comptroller Op. 85-14.

(f) The LIRR and the MTA are exempt from the jurisdiction of the New York Public Service Commission (now the Department of Transportation). N.Y. Pub. Auth. Law § 1266(8); *see Long Island Rail Road Co. v.*

Public Service Commission, 30 A.D.2d 409, 292 N.Y.S.2d 167 (2d Dep't 1968), *aff'd mem.*, 23 N.Y.2d 852 (1969).

7. The LIRR has its own police officers, who have powers equal to those of all other state, county and municipal police officers. N.Y. Crim. Proc. Law § 1.20(34)(1).

8. The MTA and the LIRR are governed by Members appointed by the Governor with the advice and consent of the New York Senate. N.Y. Pub. Auth. Law § 1263(1). The Members of the LIRR are by law the same persons who serve as Members of the MTA. N.Y. Pub. Auth. Law § 1266(5).

9. The MTA sets passenger fares for the LIRR, and the MTA must hold a public hearing with respect to changes in these fares. N.Y. Pub. Auth. Law § 1266(3).

10. The MTA and LIRR may conduct investigations and hearings, have access to books and records relating thereto and may apply for court-issued subpoenas in aid of such investigations and hearings. N.Y. Pub. Auth. Law § 1265(12).

11. The MTA and the LIRR may "do all things necessary, convenient or desirable to carry out its purposes and for the exercise of the powers granted in [the Metropolitan Transportation Authority Act, N.Y. Pub. Auth. Law § 1260 *et seq.*]." N.Y. Pub. Auth. Law § 1265(14).

The fact is that "[t]he LIRR is owned and operated for the benefit of the People of the State of New York." (N.Y. Letter at 31a). The State ownership and control, and the statutory sovereign powers, governmental privileges and immunities of the LIRR are beyond dispute.

b. *The LIRR Qualifies as a Governmental Entity under All Applicable Criteria*

Petitioner claims that the Second Circuit "improperly applied . . . criteria applicable to the interpretation of terms of the NLRB and Title VII" and argues that "[t]hirteen years after the enactment of ERISA, neither the U.S. Department of

Labor, nor the P.B.G.C., nor the I.R.S. has issued any regulations clarifying the 'governmental plan' exemption or providing definitions under ERISA of terms like 'political subdivision' and 'agency or instrumentality.' " Cert. Petition at 23. Petitioner fails to mention, however, that the United States agencies have interpreted the governmental plan exemption in numerous ruling and opinions, as well as in their *amicus curiae* brief to the Second Circuit. As the Second Circuit notes, "[t]he Internal Revenue Service, however, has had occasion to define 'agency or instrumentality' under 26 U.S.C. § 414(d). That section was added to the Internal Revenue Code by Title II of ERISA and defines those 'governmental plans' which are exempt from certain qualifications requirements for favorable tax treatment." 828 F.2d at 917 (citations omitted). As the Second Circuit notes, in interpreting the "governmental plan" exemption under Title II of ERISA, "the IRS has consistently relied on *Revenue Ruling* 57-128, 1957-1 C.B. 311, which lists six factors to be considered in determining whether a particular entity is an agency or instrumentality." 828 F.2d at 118. The LIRR satisfies all six of the IRS criteria:

> (1) the LIRR serves an "essential governmental function," see N.Y. Pub. Auth. Law §§ 1264(2), 1266(5);
>
> (2) it performs its function on behalf of the State of New York, *id.*;
>
> (3) it is wholly owned by the MTA, a governmental entity, *id.* § 1266(5);
>
> (4) it is controlled by the same public appointees who are members of the MTA, *id.* §§ 1263(1)(a), 1266(5);
>
> (5) the LIRR performs functions delegated to it by the MTA pursuant to express statutory authority, *id.* § 1266(5); and
>
> (6) the LIRR is heavily dependent on state subsidies to meet its operating expenses.

828 F.2d at 918. The Second Circuit, accordingly, "adopt[ed] the IRS criteria and conclude[d] that the LIRR is an 'agency or

instrumentality' of the MTA under 29 U.S.C. § 1002(32)." 828 F.2d at 918.

As the Second Circuit noted below, the opinions, rulings and regulations of the IRS and other governmental agencies, although not conclusive on this Court, are entitled to "great deference". 828 F.2d at 918; *see Hawkins*, 402 U.S. at 605; *Batterton v. Francis*, 432 U.S. 416, 424-25 (1977). Where Congress has expressly delegated to a federal agency the power to enact regulations to prescribe standards for interpreting statutory terms, the agency (not the courts) is given primary responsibility for interpreting the statutory terms.

The United States Departments of Labor and the Treasury and the IRS, and the PBGC all have authority to issue legislative regulations and rulings under ERISA. These agencies have an expertise in interpreting ERISA that must be given great deference.

Notably, these three expert agencies apply uniform standards in analyzing and ruling on questions arising under the ERISA governmental plan exemption. The Internal Revenue Service concluded in its March 1, 1977 National Office Technical Advice memorandum that the LIRR is an agency or instrumentality of the MTA (35a).[6] And all of the United States expert agencies urge in the Government Brief in this action that the Plan is a "governmental plan". This conclusion is firmly rooted in the United States agencies' rulings and opinions,[7] and should be accorded "great deference".

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6 *See* IRS *Private Letter Ruling* 82-17128 (holding that a retirement plan of the wholly-owned subsidiary of a state transportation authority is a "governmental plan"). Further, as set forth in the Government Brief, "[t]he PBGC considers the LIRR Plan to be a government plan exempt from Title IV coverage and has never collected the premiums mandated by Title IV for private plans from the LIRR." Government Br. at 11 n.8 (14a).

7 *See Revenue Rulings* 57-128, 1957-1 C.B. 311; 79-95, 1979-1 C.B. 331; 78-276, 1978-2 C.B. 256; and 73-563, 1973-2 C.B. 24; IRS *Private*

c. *The MTA and LIRR Both Qualify as Political Subdivisions under the Hawkins and Shamberg Tests*

The Second Circuit also referred to decisions interpreting analogous federal statutes to aid in interpreting the term "political subdivision", which is not specifically defined in ERISA, and concluded that the MTA is a political subdivision of the State of New York.[8] Petitioner objects to the use of these tests, but fails to enunciate any alternative test.

(i) *The Hawkins Test*

In the leading case of *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), this Court held that a utility district fell within the "political subdivision" exception to jurisdiction of the National Labor Relations Board ("NLRB") under the Labor Management Relations Act ("LMRA"). In *Hawkins*, the Court analyzed whether the defendant utility district was a "political subdivision" under the test employed by the NLRB. Under this test, an entity is a political subdivision if it is "either (1) created directly by the state so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." 402 U.S. at 604-05. The LIRR meets the second of these alternative tests. N.Y. Pub. Auth. Law § 1266(5). And, as the Second

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Rulings 82-17128, 81-33034, 80-17089, 79-17084, 79-14066, 79-09037, 79-02043 and 78-11044; *General Counsel Memorandum* 37715; DOL *Advisory Opinions* 85-10A, 81-14A; 80-50A; 80-27A; 80-19A and 79-83A; and PBGC *Opinions* 75-18, 81-2, 81-23, 81-30, 81-31 and 81-37.

8 It is appropriate to employ decisions interpreting terms under the Labor Management Relations Act ("LMRA") to interpret ERISA terms because these statutes are precursors to ERISA. Thus, in *Ottley v. Sheepshead Nursing Home*, 607 F. Supp. 952 (S.D.N.Y. 1985), *rev'd on other grounds*, 784 F.2d 62 (2d Cir. 1986), the court observed that the definitional provisions of the LMRA and ERISA as to the term "political subdivision" are "the same" because "ERISA encompass[es] definitions under the LMRA." 607 F. Supp. at 954 n.1.

Circuit found, the MTA meets both tests. 828 F.2d at 916, *citing* N.Y. Pub. Auth. Law § 1263(1)(a) & (7).

More than just meeting these tests, (i) the Members of the LIRR and MTA are identical and are appointed by the Governor with the advice and consent of the Senate, (ii) the LIRR has the extensive governmental powers listed above, (iii) the LIRR "performs an essential governmental function" and (iv) the LIRR depends for its existence on the taxing power of the State.

(ii) *The Shamberg Test*

In two leading cases, *Commissioner v. Shamberg's Estate*, 144 F.2d 998 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), and *Commissioner v. White's Estate*, 144 F.2d 1019 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945), the Second Circuit defined the term "political subdivision" in construing the scope of the income tax exemption under the Internal Revenue Code, 26 U.S.C. § 103, for interest on obligations of a political subdivision of a state. In *Shamberg*, the Second Circuit analyzed whether the interest on bonds issued by the Port of New York Authority (the "Port Authority"), a public authority created by an interstate compact between New York and New Jersey, was tax-exempt.[9] In *White's Estate* the Second Circuit made the same analysis regarding interest on obligations of the Triborough Bridge Authority, which, like the MTA, was a New York public benefit corporation.[10]

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9 The Port Authority, which constructed and operated bridges and tunnels, had the power of eminent domain; was governed by a Board of Commissioners from New York and New Jersey; had a police force whose members were designated peace officers; could make and enforce regulations governing bridges and tunnels; was not subject to the New York or the New Jersey constitutional limitations on state and municipal debt; and its bonds and other obligations were not debts or obligations of New York or New Jersey.

10 The Triborough Bridge Authority continues to be a public benefit corporation, the Members of which now consist of the Chairman and thirteen Members of the MTA.

In *Shamberg* and *White's Estate*, the Second Circuit denoted as "sovereign" powers the power of eminent domain, the power to tax and the police power. The Second Circuit held in *Shamberg* and in *White's Estate* that to qualify as a political subdivision an entity need only exercise some of these sovereign powers. The Second Circuit, accordingly, held that the Port Authority and the Triborough Bridge Authority qualified as political subdivisions because they exercised sovereign state powers (even though they lacked the power to tax and their obligations were not state obligations). 144 F.2d at 1004-05; 144 F.2d at 1021. Applying the test enumerated in *Shamberg* and *White's Estate*, as well as the *Hawkins* test, the Second Circuit held in this action that the MTA clearly qualifies as a political subdivision of the State and that the LIRR was at least an agency or instrumentality of that political subdivision. 828 F.2d at 917. No plenary review is merited of this clear-cut and limited holding.

(iii) *The LIRR Has Qualified as a Governmental Entity since It Was Acquired by the MTA in 1966*

Petitioner contends that the LIRR is not a governmental entity because prior to 1980 the LIRR was not formally a New York State "public benefit corporation", but rather was a stock corporation. Cert. Petition at 26-28. This argument ignores the fact that, since its acquisition by the MTA in 1966, the LIRR has enjoyed a multitude of statutory sovereign powers and governmental privileges and immunities (see *supra* at 10-13). As the Second Circuit points out, "[s]ince that time, no private individual has held any beneficial interest in the LIRR." 828 F.2d at 915. Therefore, the argument that the LIRR was a for-profit corporation before 1980, and thus not the State's instrumentality, exalts form over substance. Quite simply, the LIRR is a governmental entity.[11] As the Second Circuit concludes:

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11 Petitioner also complains that LIRR employees technically were not "public employees" under State law until 1980. Cert. Petition at 8. But

"[t]he LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income." 828 F.2d at 918.

3. While the LIRR Plan Was Both Established *and* Maintained by a Governmental Entity, ERISA Merely Requires that a Plan Be Established *or* Maintained to Qualify as a Governmental Plan

Petitioner asserts that the Second Circuit "read out of ERISA the word 'established' altogether" in the governmental plan definition in 29 U.S.C. § 1002(32). Moreover, petitioner claims that the Second Circuit mistakenly chose a broad definition of "governmental plan" and that the ERISA governmental plan exemption covers only plans "established *and* maintained" by a governmental entity, not merely those "established *or* maintained." Cert. Petition at 19. Petitioner's assertion is both wrong and academic. It is wrong because the language of 29 U.S.C. § 1002(32) is unambiguous: it reads "established *or* maintained." It is academic because, as the Second Circuit explicitly held, "even if we agreed with Rose that the correct interpretation of § 1002(32) was *established and maintained*, we would still not conclude that the LIRR Plan was covered by ERISA, because the Plan was in fact established *and* maintained by the LIRR." 828 F.2d at 920 (emphasis in original).

The Plan, which is supported and financed directly by the LIRR (and indirectly by the State), unquestionably is "main-

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the controlling governmental plan exemption refers to plans established or maintained by a *governmental entity* for its employees. ERISA exempts governmental plans; the status of employees as government employees under state law has no independent relevance. ERISA states that the employees simply must be employees of employers that are states, political subdivisions or agencies or instrumentalities of any of the foregoing (*see* Government Br. at 23-26) (24a-26a).

tained" by the LIRR, a point conceded by petitioner. It is just as clear that the Plan also was "established" by the LIRR. As the Second Circuit held, "where the LIRR was acquired by a public entity and its former plan was amended *in its entirety*, the LIRR Plan was 'established' [within the meaning of ERISA] by the LIRR." 828 F.2d at 920-21 (emphasis added).

4. Concerns that Led Congress to Exempt Governmental Plans from ERISA Apply Squarely to the LIRR

Petitioner claims that "Congress meant to exclude as governmental only plans financed by *governments*," Cert. Petition at 16 (emphasis in original), and that "[t]he payment of subsidies to the LIRR by the State through the MTA is irrelevant, as neither is an 'employer' of LIRR employees." Cert. Petition at 30. The Second Circuit considered and rejected these arguments, stating that:

> Finally, the reasons for exempting governmental plans from ERISA apply with equal force to the LIRR. The LIRR has been, in effect, a state-owned railroad since 1966 when it was acquired by the MTA. Every year since then, the LIRR has received massive state operating subsidies. LIRR employees, therefore, like other governmental employees, can depend on the state's taxing power to protect their right to retirement income. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4756-57. Moreover, in light of the state's past practice of funding the LIRR's operating deficits, any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers. *See* H.R. Rep. No. 807, 1974 U.S. Code Cong. & Ad. News at 4830.

828 F.2d at 918.

The concerns that led Congress to exempt governmental pension plans from ERISA were that (1) the sudden imposition of a minimum funding requirement could create a considera-

ble, and unreasonable, burden for taxpayers and (2) the funding of public plans was generally regarded as adequate and secure because of governmental taxing authority. *See* H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4756. As the Second Circuit found, these concerns apply squarely to the LIRR, because the LIRR depends for its existence on regularly mandated and substantial State, federal and local governmental funding. 828 F.2d at 917.

The LIRR's sources of revenue include farebox receipts, relatively insignificant freight and miscellaneous revenues and the very substantial subsidies it receives through the MTA from the State, federal and local governments.[12] State and local governmental subsidies principally are derived from State tax revenues dedicated to mass transportation and subsidies mandated by State law. Without these State funds, the LIRR would not have been able to exist, for it has operated at a staggering loss each year since its acquisition in 1966 by the MTA.[13] *See* 828 F.2d at 917. For the period 1976 through 1984, the revenues from direct State appropriations and from statutorily-

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12 Indeed, the New York State Legislature clearly contemplated that the MTA and its subsidiaries would depend on subsidies when it provided that the MTA is "self-sustaining" when it is able to pay its expenses "from revenue and *other funds or property* actually available to the authority and its subsidiary corporations." N.Y. Pub. Auth. Law § 1266(3) (emphasis added). These other funds are the State, local and federal subsidies statutorily dedicated or annually appropriated to the MTA. *See Weiss v. City of New York*, 52 Misc. 2d 391, 275 N.Y.S.2d 557 (Sup. Ct. N.Y. County 1966) and *City of New York v. New York Transit Authority*, 53 Misc. 2d 627, 279 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1967) (the Transit Authority is "self-sustaining" when receiving city subsidies so long as the State Legislature enacts enabling legislation). The MTA certainly is "self-sustaining" when receiving funds directly appropriated or statutorily dedicated to the MTA by the State Legislature.

13 These losses have ranged from $4,151,000 in 1966 to $252,138,000 in 1984, the last year for which audited financial statements were available when the LIRR moved for summary judgment in the District Court.

mandated subsidies aggregated in excess of $3.2 billion, or more than 67% of the LIRR's expenses. The annual subsidies have ranged from approximately $129 million in 1976 to approximately $431.5 million in 1984.[14]

The immense mandated funding the LIRR receives from the State just to exist demonstrates that the Congressional concerns in exempting "governmental plans" apply squarely to the LIRR. Moreover, the extensive discovery taken by Rose further buttresses the determination that the Plan is a "governmental plan." As established in the depositions taken by Rose, the LIRR submits a budget each year to the MTA, which, in order to fund it, annually turns to the State for subsidies. 828 F.2d at 917. Because the funds available from farebox receipts and federal and local government subsidies are insufficient, James B. Huff, former Comptroller of the MTA, testified that "for all practical purposes, the State is the only source of funds to fund the Pension Plan for The Long Island Rail Road."[15]

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14 The dedicated annual operating subsidies include: (a) State mass transportation operating assistance (N.Y. Transp. Law § 18-b); (b) annual freight expense appropriations; (c) the operating surplus of the Triborough Bridge and Tunnel Authority, a State public benefit corporation (N.Y. Pub. Auth. Law §§ 553(12), 569-c, 1219-a(2)(b) & 1219-a(3)); (d) local operating assistance (N.Y. Transp. Law § 18-b); (e) local station maintenance assessments (N.Y. Pub. Auth. Law § 1277); (f) a portion of the State mortgage recording tax (N.Y. Tax Law § 261(1)); (g) a 1/4% additional state sales tax imposed in the MTA twelve-county Metropolitan Commuter Transportation District (N.Y. Tax Law § 1109); (h) an oil company franchise tax on 3/4% of gross receipts from sales of petroleum (N.Y. Tax Law §§ 301-12); (i) transportation and transmission company taxes (N.Y. Tax Law §§ 183, 184, 184-a, 186-b & 205); (j) for two years (1982 and 1983), 7% of the revenue from a unitary tax on oil corporations (N.Y. Tax Law §§ 171-a(2) & 211(4-a)); (k) a tax on gains derived from certain real property transfers (N.Y. Tax Law § 171-a and §§ 1440 *et seq.*; and (l) a surcharge on business taxes in the MTA Metropolitan Commuter Transportation District for the support of mass transit (N.Y. Tax Law §§ 171-a(2), 183-a, 184-a, 186-b, 209-b, 1455-b & 1505-a).

15 Huff Deposition at 20 (37a). A copy of pages 19 and 20 of the deposition of James B. Huff (pages 210-11 of the Joint Appendix in the Second Circuit) is annexed as Appendix D (36a-37a).

5. Imposition of ERISA's Requirements Would Result in Grave Financial Consequences that Congress Did Not Intend to Impose on State Supported and Controlled Entities

Petitioner argues that "[t]he State of New York and the MTA are most certainly not sureties for the LIRR's obligations (including its pension plan obligations), and neither one has *any legal obligations whatsoever* to subsidize the LIRR." Cert. Petition at 31 (emphasis in original). But the Second Circuit correctly observes that "[Rose's] argument ignores the fact that many governmental services are funded in the same manner. As a practical matter, the State of New York has demonstrated its commitment to sustain the LIRR for the past twenty years . . . ." 828 F.2d at 918.

The plain fact is that if the LIRR Plan is not a governmental plan, extreme and disastrous financial consequences would be visited on the LIRR, the State and, ultimately, the taxpayers—exactly what Congress wanted to avoid in providing the governmental plan exemption.[16]

If the Plan is not a "governmental plan," it would be subject not only to the survivorship benefit provisions of ERISA, on which Rose's complaint is based, but also to a panoply of other costly requirements. These include ERISA's minimum funding standards, which require an employer to fund pension benefits through contributions to a trust at a prescribed level; its vesting and benefit calculation rules, 29 U.S.C. § 1082, 26 U.S.C. § 412; the joint and survivorship annuity provisions; benefit accrual requirements, 29 U.S.C. § 1054, 26 U.S.C. § 411(b); plan termination insurance premiums payable to the PBGC, 29 U.S.C. §§ 1306-07; and many reporting and disclosure requirements. The application of these additional ERISA provisions to the LIRR Plans would result in hundreds of millions of dollars of additional costs to the LIRR. Indeed, the Plan's independent actuary has estimated that the LIRR would

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16 As the Second Circuit concluded, "any additional costs imposed on the LIRR as a result of complying with ERISA would most likely be borne, at least to some extent, by New York taxpayers." 828 F.2d at 918.

be required to contribute an additional $302 million to fund the LIRR Plans just through December 1984 should ERISA apply to the Plan, most of which would be borne by the taxpayer. Petitioner disputes none of this, nor could she.

Conclusion

This action involves the interpretation of a limited definitional provision of ERISA in a limited factual context. The decision of the Second Circuit is based on and wholly consistent with ERISA's statutory language and legislative history, judicial precedent, and the decisions, rulings and opinions of the expert agencies charged by Congress with enforcing and administering ERISA. Further, the Second Circuit's decision does not conflict with any decision of any other federal Court of Appeals. For all of the foregoing reasons, the LIRR respectfully requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

New York, New York
February 13, 1988

Respectfully submitted,

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APPENDICES

APPENDIX A

86-7942

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSIONS APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, As members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, As members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications and THE LONG ISLAND RAILROAD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 86-7942

MARY ROSE,

Plaintiff-Appellant,

—v.—

THE LONG ISLAND RAILROAD PENSION PLAN, LONG ISLAND RAILROAD PENSION PLAN'S BOARD OF MANAGERS, LONG ISLAND RAILROAD PENSION PLAN'S JOINT BOARD ON PENSIONS APPLICATIONS, MORGAN GUARANTY TRUST COMPANY OF NEW YORK as Trustees of the Plan, T.P. MOORE and JOHN DOE, As members of the Plan Board of Managers, T.M. TARANTO, J.B. HUFF and H.J. LIBERT, As members of the Plan Board of Managers and the Joint Board on Pension Applications, E. YULE, W. STYZIAK and J. BOVE, As members of the Joint Board on Pension Applications and THE LONG ISLAND RAILROAD,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT OF INTEREST

This brief is submitted in response to the Court's invitation to the United States to submit its views at the oral argument of the instant case held on March 30, 1987.

When this case was previously before the Court in 1982, the Court vacated its initial decision in favor of the plaintiff below, Mary Rose, after a petition for rehearing by the Long Island Railroad ("LIRR"). In support of the petition, the [2] Secretaries of Labor and of the Treasury of the United States, the Pension Benefit Guaranty Corporation, and the State of New York, as *amici curiae*, expressed their view that the LIRR Pension Plan was a "governmental plan" within the meaning of Section 3(32) of the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub. L. 93-406, 88 Stat. 832, 29 U.S.C. Section 1002(32). After remand to the District Court, plaintiff undertook substantial discovery and has raised new legal arguments. Now, on appeal of the District Court's decision against her, plaintiff-appellant has asserted that the present position of the Government is uncertain. After review of the present record in this case and the new arguments raised, the Government reaffirms its position that the LIRR Pension Plan was at all relevant times a "governmental plan" within the meaning of Title I of ERISA.

The Secretary of Labor, the Secretary of the Treasury, and the Pension Benefit Guaranty Corporation administer, interpret, and enforce ERISA Titles I, II, and IV, respectively.[1] As the Government stated in 1982, this case is exceptionally important. The Metropolitan Transit Authority's ("MTA") view that an adverse decision would be financially crippling at a time when it is attempting to rebuild the mass transit facilities of New York is [3] supported on the record. Moreover, a decision adverse to the LIRR might well have dramatic adverse financial impact upon other state and local governments

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1 The Secretary of Labor interprets, administers and enforces Title I of ERISA in consultation and coordination, where necessary, with the Secretary of the Treasury, who has similar and sometimes overlapping responsibilities under Title II of ERISA. In addition, the Secretary of Labor chairs, and the Secretary of the Treasury is a member of, the Board of Directors of the PBGC, which Congress created in Section 4002 of Title IV of ERISA, for the purposes, among others, of guaranteeing certain benefits under covered pension plans.

throughout the country.[2] Further, ERISA was designed specifically to remedy abuses and other detrimental practices which had historically occurred in plans maintained by private businesses. The imposition by federal agencies of the requirements of ERISA—including minimum vesting, participation and funding standards, as well as detailed regulation of administrative, investment, and other management duties, all subject to administrative, civil, and criminal investigation and prosecution by federal agencies—upon entities owned and controlled by the state or its agencies and instrumentalities, such as the LIRR may reasonably be expected to strain the relationship between the Federal Government and the States, as well as stretch the finite resources of the Federal Government to police the private pension plans for which ERISA was enacted. Finally, the Pension Benefit Guaranty Corporation could face massive, unanticipated liabilities if plans similar to that of the LIRR are terminated. These potential consequences are of the sort that Congress intended to preclude in enacting the "governmental plan" exemption of ERISA. [4] For these reasons, the Government has a direct interest in the outcome of this litigation.

STATEMENT OF THE ISSUE PRESENTED

Whether the LIRR Pension Plan is a "governmental plan" within the meaning of Section 3(32) of ERISA (29 U.S.C. Section 1002(32)).

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2 The implications of the "governmental plan" exemption extend beyond the joint and survivor annuity requirement of Title I involved in this case. A similar exemption is provided in Section 414(d) of the Internal Revenue Code of 1954 (26 U.S.C.), as added by Title II of ERISA, for "governmental plans" with respect to the minimum participation, vesting and funding requirements for trust qualification under Section 401 of the Internal Revenue Code. In addition, the benefit-guaranty obligations of PBGC do not extend to "governmental plans" as similarly defined in Section 4021(b)(2) of ERISA, 29 U.S.C. Section 1321(b)(2).

STATEMENT OF THE CASE

Appellant Mary Rose is the surviving spouse of Richard A. Rose, who died of leukemia in 1976. (A. 674, 989).[3] Mr. Rose was an employee of the LIRR and a participant in the LIRR Pension Plan (the "Plan"). (*Ibid.*) Although, by 1975, he had met the age and service requirements under the plan for a pension, he never retired, having died while he was still working.

Under the plan (A. 46), Mr. Rose had the right to elect survivorship benefits—*i.e.*, that a pension be paid to his wife upon his death. (A. 53-54, 364.) If he had chosen this alternative, benefits payable upon his retirement would be reduced to reflect the actuarial value of Mrs. Rose's potential annuity. Mr. Rose did not make this election.[4] (*Ibid.*) Thus, upon Mr. Rose's death, Mrs. Rose was not entitled, under the express terms of the Plan, to receive pension benefits.

In 1976, Mrs. Rose made a formal application to the LIRR Pension Plan for a survivor's annuity. (A. 677). The application **[5]** was subsequently denied on the basis that Mr. Rose had not filed an election for such annuity. (A. 365, 678.)

Mrs. Rose instituted this action on June 5, 1981. On December 11, 1981, the District Court for Eastern District of New York (Bramwell, J.) granted the LIRR's motion to dismiss on the grounds that the Plan was a "governmental plan" exempt from the requirements of ERISA. (A. 10B.)

On appeal, this Court rendered an opinion on September 28, 1982, which held that the plan was not a "governmental plan." (A. 793.) The LIRR petitioned for rehearing, which was granted by this Court on December 23, 1982. (A. 795.) The United States and the State of New York had filed briefs as *amici curiae* in support of the position that the Plan was a "governmental plan." (A. 156-163, 121-149.) On rehearing, the

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3 "A." references are to the Joint Appendix submitted by the appellant.

4 At the time of Mr. Rose's death, under ERISA, Section 205, 29 U.S.C. Section 1055, plans covered by Title I must, in general, have provided survivorship benefits unless the participant elected a single life annuity.

Court vacated its decision, withdrew its opinion, and remanded the case to the District Court to consider the "significant matters" brought to the Court's attention on rehearing. (A. 795)

On remand, after discovery, the LIRR and Mary Rose both filed motions for summary judgment. (A. 103, 724.) The District Court granted the LIRR's motion, and denied Mary Rose's motion. (A. 1045.) The District Court stated that the plain language and legislative history of the ERISA exemption "on balance point decidedly to the conclusion that the Long Island Railroad Plan falls within the exemption." (A. 1047.) The court ruled that the MTA is a political subdivision of New York, and that the LIRR is [6] an agency of the MTA and "perhaps" also of the State of New York. (A. 1047-1048.)[5]

By letter dated September 30, 1986, Mary Rose requested reconsideration. (A. 1049). The District Court entered an order dismissing the complaint on October 16, 1986 (A. 1053). Judgment was entered on October 21, 1986. (A. 1056.) Mary Rose timely filed a notice of appeal on November 5, 1986. (A. Vol. I, Docket Entries.)

SUMMARY OF ARGUMENT

ERISA is complex and far-reaching pension legislation which was designed to remedy abuses and other detrimental practices that had historically occurred in the *private* sector. The pervasive federal standards mandated by ERISA, enforced by administrative and civil proceedings, as well as criminal prosecutions by federal agencies, were not designed for nor intended to cover plans of entities owned and controlled by the state or its agencies or instrumentalities. Thus, Congress enacted a broad governmental exemption, covering not merely plans of the federal and state governments, but also plans of

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5 The District Court also referred to its earlier conclusion that the LIRR is probably a political subdivision, but, in any event, is clearly an agency or instrumentality of the MTA." (A. 1047, 10I-J.)

political subdivisions of a state, and of agencies and instrumentalities of any of the foregoing.

The instant case involves a prime example of the reasons why Congress exempted such plans. The governmental ownership, control, funding and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York. Federal regulation of the LIRR [7] plan would deeply implicate the State of New York's financial interests, as well as undercut its prerogatives. This is precisely the sort of federal intrusion that the governmental plan exemption was designed to preclude.

The appellant's theory that the exemption should be narrowly construed would subvert Congress' intent and is entirely unsupported by relevant authorities. To the contrary, in *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971), the Supreme Court broadly interpreted and applied a governmental exemption under analogous legislation and circumstances. Federal regulation of entities owned and controlled by the states or their agencies or instrumentalities simply should not be presumed under ERISA.

Moreover, appellant's contention that the exemption only applies to plans "established" by a governmental entity is directly contrary to the controlling statutory provision, which provides that plans established *or* maintained by a governmental entity are exempt. Appellant's further contention that LIRR is not an "instrumentality" of a "government" is, *inter alia*, wrong on the facts. The record in this case clearly demonstrates that the LIRR is an agency, instrumentality or political subdivision of the State of New York. Accordingly, the LIRR Plan meets the exemption test under ERISA, Sections 4(a), 3(32).

Finally, appellant's contention that the governmental exemption did not apply prior to the 1980 conversion of the LIRR into a "public benefit corporation," when its employees became more fully protected "public employees" under state law, is without merit. Congress, based upon concerns of federalism, decided to exempt from ERISA regulation the entire category of [8] governmental plans, regardless of the degree of protec-

tion that each plan may afford to covered employees. A plan is not "governmental" because it is generous or secure, or private because it is not. Since LIRR is clearly a governmental entity within the scope of ERISA Sec. 3(32), it is irrelevant whether or not the pension plans of LIRR employees and the pension plans of "public employees" (as defined by state law) were equally secure.

The judgment of the District Court should be affirmed.

ARGUMENT

THE DISTRICT COURT CORRECTLY HELD THAT THE LIRR PENSION PLAN IS A "GOVERNMENTAL PLAN" WITHIN THE MEANING OF TITLE I OF ERISA

A. *Introduction—The Statutory Scheme*

The consequences of a determination that a pension plan is covered by ERISA (Pub. L. No. 93-406, 88 Stat. 1009, as amended) are far-reaching. As described by the Supreme Court, ERISA is a "comprehensive and reticulated statute." *Nachman Corp.* v. *Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). The statute itself is an "interlocking, interrelated, and interdependent remedial scheme." *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 145 (1985). The regulations issued by the federal agencies charged with implementing the statute are necessarily massive and complex. See 26 C.F.R. Secs. 1.401-1, *et seq.*, Sec. 11.401(a)-11, *et. seq.*, Sec. 54.4971-1, *et seq.* and Sec. 54.4975-1, *et seq.*; 29 C.F.R. Sec. 2509.75-1, *et seq.*, and Secs. 2601.1, *et seq.*

[9] Title I of ERISA, Sections 1-515, 29 U.S.C. Sections 1001-1145, administered by the Secretary of Labor, dictates substantive standards which must be met by private pension plans pertaining to the coverage, accrual, vesting, and funding of pension benefits. See ERISA, Secs. 201-207, 301-305. The statute details various reporting, disclosure, and record-keeping requirements, as well as fiduciary standards. See ERISA, Secs. 101-107, 209-210, 401-411. The Secretary of

Labor is granted comprehensive investigatory powers. ERISA, Sec. 504. The multiplicity of substantive and procedural requirements are enforced through criminal penalties as well as civil proceedings. ERISA, Secs. 501-503.

Title II of ERISA, Sections 1011-1052, see 26 U.S.C. Sections 401, *et seq.*, establishes various substantive and procedural requirements pertaining to the qualification of pension plans for favorable tax treatment, which is generally considered crucial to the success of a pension program.[6] Title II is administered by the Secretary of the Treasury (the Internal Revenue Service), who, of course, also has broad investigatory powers. Violation of Title II standards may lead not only to disqualification pension plans, but to the imposition of additional taxes or penalties. See, *e.g.*, 26 U.S.C. Sec. 4971 (excise tax imposed where funding requirements not met).

[10] Title III of ERISA, Sections 3001-3043, 29 U.S.C. Sections 1201-1243, contains provisions designed to coordinate enforcement efforts of the various responsible federal agencies, and also provides for further study of matters which could be the subject of future amendments to ERISA or other pension legislation. In particular, ERISA mandated a study of "retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State * * * or political subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA, Sec. 3031, 29 U.S.C. Sec. 1231.

Title IV of ERISA, Sections 4001, *et seq.*, 29 U.S.C. Section 1301, *et seq.*, is administered by the Pension Benefit Guaranty Corporation ("PBGC"), a wholly-owned United States Government corporation. ERISA, Sec. 4002, 29 U.S.C. Sec. 1302. The PBGC also has broad rulemaking, investigatory, and enforcement authority. ERISA, Secs. 4002, 4003, 29 U.S.C. Secs. 1302, 1303. In a function analogous to that of the

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6 Governmental plans are exempt from Title II requirements regarding minimum funding, vesting, participation, and joint and survivor annuity requirements. Title II does, however, contain certain requirements applicable to governmental plans. See, *e.g.*, 26 U.S.C. Sec. 415 (benefit/contribution limitations).

Federal Deposit Insurance Corporation, the PBGC guarantees the payment of certain pension benefits in covered plans which terminate with insufficient assets to pay those benefits.[7] The PBGC is funded primarily through compulsory premiums charged to plans maintained by private businesses. 29 U.S.C. Secs. 1302(g)(2), 1306, 1307. The PBGC is not funded by, nor does it guarantee, plans established and maintained by "the government of any state or political [11] subdivision thereof, or by any agency or instrumentality of any of the foregoing." ERISA, Sec. 4021(b)(2), 29 U.S.C. Sec. 1321(b)(2).[8]

ERISA was enacted in 1974, after nearly a decade of study (*Nachman*, *supra*, 446 U.S. at 361), by a vote of 85 to 0 in the Senate and 407 to 2 in the House of Representatives. III Legislative History of ERISA, Senate Committee on Labor and Public Welfare, (GPO, April, 1976) (hereinafter "Legis. Hist.") at 4718, 4835. The legislative history is replete with discussion of historical abuses and other detrimental practices in the *private* sector. *E.g.*, II Legis. Hist. 1599, 1634, 1666, 1767, 1830, 1866; III Legis. Hist. 4658, 4665, 4710, 4749, 4795, 4799. The statutory scheme was the subject of years of deliberation by and negotiation among *private* business and labor groups, and interested federal agencies. State and local governments had no comparable participation in the process. The pervasive substantive and procedural requirements of ERISA simply were neither designed for, nor intended to cover, entities owned and controlled by states or their agencies or instrumentalities. Moreover, in the 13 years that have passed since Congress mandated the study of possible federal regulation of

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7 The PBGC is also charged with the duty "to encourage the continuation and maintenance of voluntary private pension plans * * * *." ERISA, Sec. 4002(a)(1), 29 U.S.C. Sec. 1302(a)(1).

8 The Pension Benefit Guaranty Corporation has independent litigating authority (ERISA, Sec. 4002(b)(1), 29 U.S.C. Section 1302(b)(1)) and has joined with the United States in the preparation and submission of the instant brief, and concurs in the views expressed herein. The PBGC considers the LIRR plan to be a government plan exempt from Title IV coverage and has never collected the premiums mandated by Title IV for private plans from the LIRR.

non-private plans, Congress has not chosen to enact such legislation. See ERISA, Sec. 3031(a), 29 U.S.C. Section 1231(a). **[12]**

B. *Plans maintained by an agency or instrumentality of a state, or political subdivision thereof, such as the LIRR Pension Plan, are expressly exempted from coverage under Title I of ERISA.*

The appellant's claim under ERISA must fail unless Title I of ERISA (specifically, Sections 205(a) and (e), 29 U.S.C. Sections 1055(a) and (e)), applied to the LIRR Plan prior to 1977. Section 4(b) of Title I of ERISA, 29 U.S.C. Section 1003(b), provides in pertinent part: "the provisions of this title shall not apply to any employee benefit plan if—(1) such plan is a governmental plan (as defined in section 3(32))."[9] Section 3(32) of Title I, 29 U.S.C. Section 1002(32), provides, in pertinent part:

> The term "governmental plan" means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

The ultimate goal of statutory interpretation is the effectuation of Congressional will. *United States* v. *American Trucking Ass'n*, 310 U.S. 534, 542 (1940). The starting point in search of that goal is the language used by the legislators. *Reiter* v. *Sonoton Corp.*, 442 U.S. 330, 337 (1979). Other aids are the structure of the statute and its legislative history. *United States* v. *American Trucking Ass'n*, 310 U.S. at 543-544. In addition, great weight is accorded to the interpretation of the statute by those charged with its implementation. *Id.* at 549; **[13]** *Red*

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9 Thus, appellant's suggestion (Br. 3), without citation of authority, that the LIRR Plan may be a private plan for the purpose of vesting, but "governmental" for the purpose of funding, is contrary to the express terms of the statute and clearly wrong.

Lion Broadcasting Co. v. *FCC*, 395 U.S. 367, 381 (1969) ("the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong"); *Belland* v. *PBGC*, 726 F. 2d 839, 843 (D.C. Cir. 1984), cert. denied, 469 U.S. 880 (1984). Here, these relevant guides to statutory interpretation lead to the conclusion that the LIRR pension plan is a governmental plan under Section 3(32) of Title I and thus is not covered by ERISA.

A natural and sensible reading of the statutory language of Section 3(32) of Title I includes, within the term "governmental plan", plans established or maintained by the United States government, a state government, a political subdivision of the state, and any of their agencies or instrumentalities. It is not limited only to plans established or maintained directly by states, or political subdivisions which have all the attributes of governments. Nor is it limited to the first tier agencies or instrumentalities. States or political subdivisions may use multitier agencies or instrumentalities, but every tier is essentially an agency or instrumentality of the state or political subdivision that owns and controls it. Indeed, any other approach would undermine the states control over the processes by which they use their instrumentalities to effect their public purposes.

An analysis of the purposes underlying the "governmental plan" exemption supports this construction. The problems requiring national legislation arose with respect to pension plans operated by the private sector. See p. 10, *supra*. At the time ERISA was enacted, Congress believed that many public **[14]** sector plans were adequate with respect to vesting and to funding (because of the taxing power). See H.R. Rep. No. 533, 93 Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648; H.R. Rep. No. 807, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4670, 4756. However, Congress clearly recognized that there were flaws in public, as well as private sector, pension programs:

> The Committee is convinced that legislation seeking reform in the public sector must proceed with a thorough study of the effects of such proposals. There are literally

> thousands of public employee retirement systems operated by towns, counties, *authorities* and cities in addition to the state and Federal plans. *Eligibility, vesting and funding provisions are at least as diverse as those in the private sector with the added uniqueness added by the legislative process. For this reason the Committee is convinced that additional data and study is necessary before any attempt is made to address the issues of vesting and funding with respect to public plans.* [II Legis. Hist. at 2356 (House Education and Labor Committee (emphasis added).]

Congress also realized that many public plans were funded on a "pay as you go" basis, and that ERISA's funding standards would require an immediate and, in Congress's judgment, unreasonable burden on state taxpayers. See H. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4648. Significantly, Congress did not choose to enact standards for defining and regulating inadequate public plans. To the contrary, it exempted the entire class of governmental plans (ERISA, Sec. 4(b), 29 U.S.C. Sec. 1003(b)) and ordered further study of the **[15]** matter because of the particular problems that would be involved (ERISA, Sec. 3031, 29 U.S.C. Section 1231).[10] In other words, with

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10 ERISA Section 3031 provides:

> Sec. 3031(a). The Committee on Education and Labor and the Committee on Ways and Means of the House of Representatives and the Committee on Finance and the Committee on Labor and Public Welfare of the Senate shall study retirement plans established and maintained or financed (directly or indirectly) by the Government of the United States, by any State (including the District of Columbia) or political subdivision thereof, or by any agency or instrumentality of any of the foregoing. Such study shall include an analysis of—
>
> (1) the adequacy of existing levels of participation, vesting, and financing arrangements,
>
> (2) existing fiduciary standards, and
>
> (3) the necessity for Federal legislation and standards with respect to such plans.

respect to both funding and benefits, Congress opted to leave the crucial decisions as to priorities and timing of state expenditures to the states. Clearly, at the heart of this decision were concerns of federalism. See *Feinstein* v. *Lewis*, 477 F. Supp. 1226, 1261 (S.D.N.Y. 1979), aff'd, 622 F. 2d 573 (2d Cir. 1980) (the purposes of ERISA's governmental plan exemption is "to refrain from interfering with the manner in which the state and local governments operate employee benefit systems.")

[16] Congress's categorical refusal to regulate plans of public entities under ERISA and its decision to preserve local perogatives hardly suggests a narrow reading of the governmental plan exemption. Thus, the appellant's primary contention (Br. 11), that the "governmental plan" exemption here should be narrowly construed, contravenes the purposes of the statute. Congress's concerns of federalism and of imposing standards designed for private plans and enforced by federal agencies upon state-related entities, Congress's recognition that further study was required with respect to the legislation regulating such public entities, and Congress' subsequent choice *not* to regulate such entities at the current time, all indicate that narrow construction—*i.e.*, broad federal pension regulation of entities owned and controlled by the state or its agencies or instrumentalities was not intended.

The only ERISA case cited by the appellant to support the contrary proposition, *Connolly* v. *PBGC*, 581 F. 2d 729, 732 (9th Cir. 1978), cert. denied, 440 U.S. 935 (1979), involved an unquestionably *private* plan which was clearly covered by ERISA, but was argued to be exempt from the Title IV insurance guaranty because it allegedly kept "individual accounts" within the meaning of ERISA, Section 4021(b)(5), 29 U.S.C. Section 1321(b)(5). *Id.* at 733. Moreover, the Court of Appeals' conclusion that the "individual account" exemption did not apply, just as PBGC had argued, was reached in light

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In determining whether any such plan is adequately financed, each committee shall consider the necessity for minimum funding standards, as well as the taxing power of the government maintaining the plan.

of the Court's "great deference to the PBGC in the construction and application of ERISA." *Id.* at 730. *Connolly* does not support the appellant's position here.

More to the point is the Supreme Court's construction of a *governmental* exemption under the Labor Management Relations [17] Act, 29 U.S.C. Section 141 *et seq. NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). That Act, like ERISA, is remedial,[11] but the Supreme Court construed the exemption broadly so as to cover a quasi-governmental entity (a public utility district). *Id.* at 604-608. In short, it should hardly be presumed that Congress intended to regulate state-related, quasi-governmental entities under ERISA.

C. *The LIRR is a governmental entity within the plain language, and consistent with the purposes of, the "governmental plan" exemption of ERISA*

In our view, this case does not present a borderline question. The governmental ownership, control, funding, and powers, as well as the public purpose, of the LIRR overwhelmingly establish its governmental nature and nexus to the State of New York and the MTA.

In 1965, the MTA was created by the State of New York to acquire the LIRR and to preserve and improve local commuter transportation. 1965 N.Y. Laws, ch. 324. The State of New York had determined that the deterioration of the LIRR constitutes a serious threat to the economic well-being of the state. *Id.* The New York State Legislature issued findings and declarations to the effect that MTA would be charged with the "essential public purpose" of strengthening and improving commuter services of "vital importance to the commerce, defense and general welfare [18] of * * * the state, and the

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11 See fn. 8, *infra*; see also *NLRB* v. *Metallic Building Co.*, 204 F. 2d 826 (5th Cir. 1953), cert. denied, 347 U.S. 911 (1953); *Philip Carey Manufacturing Co.* v. *NLRB*, 331 F. 2d 720 (6th Cir. 1964), cert. denied, 379 U.S. 588 (1965); *Trimly Valley Iron & Steel Co.* v. *NLRB*, 410 F. 2d 1161 (5th Cir. 1969).

nation." In establishing the MTA, the State of New York itself expressly undertook "to take appropriate measures and assume responsibilities for the preservation of such essential services." *Id.*

The State of New York ultimately controls the MTA and the LIRR through its power to appoint the members who govern those entities. N.Y. Pub. Auth. Law Sections 1263, 1266. Moreover, the State of New York financed the acquisition of the LIRR, and the State's undisputed massive subsidies have been necessary to the continued operation of the MTA and LIRR. 1967 N.Y. Laws chs. 715, 718; A. 277-287, 367-368.

The LIRR has been a wholly-owned subsidiary of the MTA at all relevant times, and, as such, has all the "privileges, immunities, tax exemptions, and other exemptions * * *" of the MTA. N.Y. Pub. Auth. Law Sec. 1266. Both the MTA and the LIRR are exempted from state and local taxes (N.Y. Pub. Auth. Law Sec. 1275), and their facilities and operations are not under the jurisdiction of city or other local governments (N.Y. Pub. Auth. Law Sec. 1260 *et seq.*). The State of New York delegated powers to the MTA and the LIRR commensurate with what the legislature declared was their "essential governmental function" (N.Y. Pub. Auth. Law Sec. 1264), including eminent domain (N.Y. Pub. Auth. Law Sec. 1267), rulemaking authority which supersedes local regulations (N.Y. Pub. Auth. Law Section 1266), police powers (N.Y. Crim. Proc. Law Sec. 1.20(34)(1), broad investigatory authority (N.Y. Pub. Auth. Law Sec. 1265), and after public hearing, rate-setting authority (N.Y. Pub. Auth. Law Section 1266). Violation of **[19]** certain rules promulgated by the MTA or LIRR are punishable by fine or imprisonment. *Id.*

In *NLRB* v. *Natural Gas Utility District of Hawkins County*, *supra*, 402 U.S. 600, the Supreme Court ruled that a Tennessee utility met the "political subdivision" exemption under the Labor Management Relations Act, 29 U.S.C. Sections 141 *et seq.*[12] It is clear, and, indeed, undisputed, that the MTA and

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12 The Supreme Court agreed with the NLRB that an entity is a "political subdivision" if it is either administered by persons who are

the LIRR meet the "political subdivision" criteria under *Hawkins*. See *Id.* at 604-608; (A. 791-792); *Capers* v. *LIRR*, 429 F. Supp. 1359 (S.D.N.Y. 1981), aff'd, 573 F. 2d 1291 (2d Cir. 1977). Even more to the point, in the instant case, the MTA and the LIRR have a nexus to the State of New York and have been granted governmental powers from the State which are highly analogous to the relationship between the quasi-governmental entity and the state considered in *Hawkins*. As we have noted, the Supreme Court in *Hawkins* held that the utility there was a political subdivision, reversing the NLRB's decision to the contrary.

[20] In light of the pervasive governmental ownership, funding, control, and powers of the MTA and LIRR, and their nexus to the State of New York, the District Court was clearly correct that, at a minimum, the MTA is a political subdivision of the State of New York. And, of course, its wholly-owned subsidiary, LIRR, is an agency or instrumentality of MTA. Alternatively, these same factors demonstrate, as the district court suggested, that the LIRR is a political subdivision, agency, or instrumentality of the State of New York.

Appellant's contention on this appeal (Reply Br. 4), that the "governmental plan" exemption does not apply because the LIRR Plan was not "established" by a governmental entity, is without merit. The factual predicate for this claim is, at best, questionable. See LIRR Br. 41-43. More importantly, it is

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responsible to public officials or the electorate, or created by the state so as to constitute a department or administrative arm of the government. *Id.* at 604-605.

Both the LMRA and ERISA were enacted to strike what Congress regarded as an appropriate balance between private business and labor organizations. See H. Rep. No. 533, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4647. Thus, *Hawkins* is persuasive, although not controlling, precedent with regard to exemptions covering quasi-governmental entities from private business/labor, remedial legislation. See, *Feinstein* v. *Lewis*, 477 F. Supp. 1256, 1259 (S.D. N.Y. 1979), aff'd, 622 F. 2d 573 (2d Cir. 1980). Indeed the factors considered in *Hawkins* are quite obviously related to Congress' reasons—primarily concerns of federalism—for exemption of state-related entities from ERISA.

undisputed that the Title I "governmental plan" exemption controls the outcome of this case, and that provision exempts a plan "established *or* maintained" by a governmental entity. ERISA, Sec. 3(32), 29 U.S.C. Sec. 1002(32).[13] At a minimum, the LIRR (if not MTA and the State [21] of New York, as well) maintained the plan at all times relevant here. Thus, it matters not whether the LIRR Plan was originally "established" by a private or governmental entity.

Appellant's further contention (Br. 21-27) that the exemption does not apply because neither LIRR nor MTA is a "government" is also without merit. First, as we have discussed, both are political subdivisions, agencies, and/or instrumentalities of the State of New York. Thus, even assuming that appellant correctly construes Section 3(32) to require that an exempt plan be maintained by a government or instrumentality of a government, that "requirement" is met here.

At all events, appellant's narrow construction of the statute is at odds with both the purpose of the statute,[14] as

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13 Where a plan is maintained by a governmental entity, the nature of the entity which established the plan in the distant past bears no relationship to Congress's concerns in enacting the governmental plan exemption—noninterference with current state and local pension matters—nor any other significant concerns that we can identify. (Nothing in the legislative history indicates Congress ever focused upon the significance or meaning of "established" in this context.) Thus, although the "governmental plan" definitions in Title II and Title IV, by the terms of the statute, cover plans maintained *and* established by governmental entities, the agencies with enforcement responsibility have construed this language to avoid frustrating Congress' intent. *E.g.*, PBGC Op. Ltr. 75-44 (term "established" construed so that "plan maintained by a public agency or political subdivision which has been taken over from a private business is excluded from the provisions of Title IV"); see also PBGC Op. Ltr. 75-45.

14 Appellant's suggestion that a narrow construction is justified because only a "government" has the necessary taxing power to fund "governmental plans" is patently frivolous since, even under appellant's construction, the statute would cover an agency or instrumentality (which is without taxing power) of a government. See *Commissioner* v. *Shamberg*, 144 F. 2d 998, 1005 (2d Cir. 1944), cert. denied, 323 U.S. 792 (1945), wherein the

[22] pointed out *supra*, pp. 13-14, and analogous provisions of the statute itself. For purposes of assigning responsibility for a pension plan, Title I of ERISA defines an "employer" as an individual or entity "acting directly as an employer, or *indirectly* in the interest of an employer, in relation to an employee benefit plan * * *." ERISA, Sec. 3(5) and (9); 29 U.S.C. Sec. 1022(5) and (9). Further, during the time period at issue here, Title IV of ERISA provided that the "employer" responsible for the plan was not merely the direct plan sponsor, but also all other trades or businesses under *common control*. ERISA, Sec. 4001(b), 29 U.S.C. Sec. 1301(b) (Supp. 1976). Under Title II, various provisions are also enforced by reference to the entire chain under common control. 26 U.S.C. Secs. 414(b), 414(c). The point here, of course, is *not* that the State of New York formally "owned" the MTA or LIRR,[15] but rather that the above provisions of ERISA demonstrate Congress's intent to pierce the form of an organization to effectuate the purposes of the statute. See *PBGC* v. *Ouimet Corp.*, 711 F. 2d 1085, 1089-90 (1st Cir. 1983), cert. denied, 464 U.S. 961 (1984). Indeed, Congress defined governmental plans, for the pur-

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Court opined that the lack of taxing power was not controlling in determining whether the part of New York Authority was a political subdivision of a state for purposes of exempting from federal taxation the interest on its obligations under the predecessor of Section 103(a)(1) of the Internal Revenue Code of 1954. See also *Philadelphia National Bank* v. *United States*, 666 F. 2d 834 (3d Cir. 1981); Rev. Rul. 73-563, 1973-2 Cum. Bull. 24.

Of equal irrelevance is the fact that the LIRR plan was set up pursuant to a collective bargaining agreement rather than by statute. The exemption is plainly applicable in circumstance where the state itself engages in collective bargaining to set up a pension plan for its employees. The state's interest is not diminished where, as here, an instrumentality that the state controls utilizes the collective bargaining process. Indeed, this Court affirmed a district court's conclusion that the fact that a plan is collectively bargained does not prevent exemption under ERISA Section 3(32). *Feinstein* v. *Lewis*, *supra*.

15 We note, however, that in *United Transportation Union* v. *LIRR*, 455 U.S. 678, 682 (1982), the Supreme Court referred to the LIRR as a "state-owned railroad."

pose of the mandated study, as plans "maintained or financed (*directly* or *indirectly*) * * * by any State * * * or political subdivision thereof, or any agency or **[23]** instrumentality of any of the foregoing." ERISA Sec. 3031, 29 U.S.C. Sec. 1231 (emphasis added).[16]

Regardless of the form of ownership, in substance, federal pension regulation of the LIRR would deeply implicate the interests and prerogatives of the State of New York, irrespective of the State's historical choice to place formal ownership of LIRR in the MTA rather than in its own name. This is the very result that the governmental plan exemption was intended to preclude. The risk of such federal interference is obviously why Congress chose to exempt *political subdivisions*, *agencies*, and *instrumentalities*, as well as state governments. ERISA, Sec. 3(32).

The appellant also contends (Br. 13-14) that the Title I governmental exemption did not apply prior to the formal conversion of the LIRR into a "public benefit corporation" in 1980. Appellant argues that this is so because, prior to 1980, the LIRR employees were not "public employees" and the LIRR was a "private, for-profit stock corporation." These arguments are also without merit.

To begin with, the fact that prior to 1980, LIRR employees were not characterized as "public employees" under state law does not demonstrate that, for the purposes of ERISA, they were not employed by an entity whose plans are eligible for the "governmental plan" exclusion. The construction and application of the governmental exemption is a matter of federal rather than state **[24]** law. See *NLRB* v. *Hawkins*, *supra*, 402 U.S. at 603-604; *Jerome* v. *United States*, 318 U.S. 101, 104 (1943). Since the State of New York exercises pervasive direct and indirect control over the finances and operations of the LIRR (which is owned by a state agency) by way of massive year to year subsidies and its power of appointment of LIRR

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16 We note that the fact that a fundamentally private entity may receive governmental subsidies or other governmental financing does not mean, of course, that it is an entity whose pension plan would be entitled to the "governmental plan" exemption. See PBGC Op. Ltr. 81-13.

directors, the state law distinction between "public employees" and LIRR employees is not important with respect to Congress' concerns of federalism. A state is, of course, free to choose different benefits and protections for those who are employed by it, its agencies or entities owned and controlled by the state or its agencies. In fact, that very power of choice was demonstrated here, when the State of New York simply converted the LIRR employees to official "public employees" in 1980.

In any event, regardless of whether the LIRR employees may be considered employees of the State of New York, they were clearly employees of an agency or instrumentality of New York, or a political subdivision thereof. That is plainly all that the statute requires. ERISA, Sec. 3(32). Therefore, appellant's further argument that the pensions of "public employees" were better protected than those of LIRR employees, even if true, is simply beside the point. Moreover, as discussed *supra*, pp. 13-14, Congress decided to exempt the entire category of governmental plans, rather than exempt plans on a case by case basis depending upon the degree of protection that each plan afforded. Indeed, many states and local governments, unlike New York, are not subject to a *state* constitutional provision that retirement "benefits * * * shall not be diminished or impaired." McKinney's Const., Art. V, **[25]** Sec. 7.[17] At bottom, Congress chose to leave these matters to state and local authorities, rather than dictate minimum federal standards, at least pending further study.

Appellant's argument that the LIRR was a private corporation is wrong on the facts and, in any event, irrelevant as a matter of law. LIRR was, beyond any doubt, publicly owned

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17 In this regard, the taxing power of a government only guarantees the funding of plans to the extent that the government chooses, on a year to year basis, to appropriate the funds to do so. Thus, the decision of a state to fund an instrumentality, as New York State funds the LIRR, is not fundamentally different from the decision of a government to fund a pension plan of its *direct* employees. That New York, as a matter of state law, may have constitutionally limited the state legislature's prerogative does not change the fact that the state controls the funding and benefits of its pension programs.

at all relevant times by the MTA. And even if the LIRR's operations had not depended upon massive state subsidies, and it had been profitable, that fact would not change the overwhelmingly governmental nature of the LIRR. See pp. 16-18, *supra*.[18] A state or other governmental entity clearly may charge for its services, and if it happens to make a "profit" in a discrete endeavor, that hardly turns the state or governmental entity into a private enterprise.

Finally, the fact that the LIRR was a corporation whose stock was wholly owned by a public authority, rather than formally denominated itself as an "authority," "agency," etc., is without significance here. Compare ERISA, Sec. 4002, 29 U.S.C. Sec. 1302 **[26]** (PBGC is a wholly-owned Government *corporation*; the United States, in general, is not liable for PBGC's obligations.) It is obviously the nature of the entity, rather than its form, that is controlling. LIRR was simply not privately owned or controlled at any relevant time. Moreover, Congress enacted the governmental exemption to cover the distinctly broad concepts of "agency" *or* "instrumentality." At a minimum, the LIRR meets that test.

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18 Appellant's observation that many private utilities and railroads may be granted certain quasi-governmental powers does not aid her cause. If such utilities or railroads were, like the LIRR, wholly owned by a governmental entity, as well as funded and controlled by a state or an agency or instrumentality thereof, they too would be exempt from ERISA coverage.

CONCLUSION

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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[27] CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on counsel for the appellant and the appellees, by mailing four copies thereof on this *20th* day of April, 1987, in an envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX B

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BY HAND

April 20, 1987

Hon. Wilfred Feinberg
Chief Judge

Hon. Thomas J. Meskill
Circuit Judge

Hon. Frank X. Altimari
Circuit Judge

United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Mary Rose v. *The Long Island Railroad Pension Plan, et al.*
(2d Cir. No. 86-7942)

Dear Chief Judge Feinberg and Judges Meskill and Altimari:

We understand that in the course of oral argument on March 30, 1987 the Court expressed an interest regarding the current position of those government bodies that previously filed

amicus briefs and affidavits in the above-referenced action, which presents the issue whether The Long Island Rail Road Pension Plan (the "LIRR Plan") is a "governmental plan" within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"). The State submitted an affidavit and amicus brief when this case was previously before the Court (Appendix at 121, 127). More recently, in March 1986, the State of New York submitted an affidavit in support of the LIRR's motion for summary judgment before Judge Bramwell (Appendix at 374).

This letter is submitted on behalf of the State of New York. It is the position of the State of New York that the LIRR Plan is a "governmental plan" under ERISA and thus not subject to most requirements of ERISA, including the funding requirements.

The State of New York hereby restates and reaffirms the position set forth in (i) the affidavit of Judith Gordon, sworn to March 17, 1986 (Appendix at 354), (ii) the affidavit of Amy Juviler, sworn to October 26, 1982 (Appendix at 121), and (iii) the brief submitted by the State of New York to this Court dated November 9, 1982 (Appendix at 127).

The LIRR is owned and operated for the benefit of the People of the State of New York and is governed by a Board appointed by the Governor of the State of New York with the advice and consent of the New York State Senate. Since its acquisition by the State through the Metropolitan Transportation Authority ("MTA") in 1966 the LIRR has had all the statutory privileges, immunities and exemptions of the MTA. N.Y. Pub. Auth. Law § 1266(5). The LIRR thus has possessed substantial governmental powers in its own right since it was acquired by the State in 1966 that it did not possess prior to the State's acquisition. (See Appellees' Br. at 14-18). For example, being wholly owned by the MTA, the LIRR has the power to make rules and regulations governing the conduct and safety of the public, violations of which are punishable by fine and up to 30 days imprisonment. N.Y. Pub. Auth. Law § 1266(4) and (5). Where such rules and regulations conflict with any local law, ordinance, rule or regulation, the LIRR's rule or

regulation prevails. *Id.* The LIRR also has its own police officers, who have powers equal to those of all other state, county and municipal police officers, on or off LIRR property (N.Y. Crim. Proc. Law § 1.20(34)(1); the LIRR is exempt from the jurisdiction of the Public Service Commission (now the New York State Department of Transportation) (N.Y. Pub. Auth. Law § 1266(8)); the LIRR is exempt from all state, county and municipal taxes (N.Y. Pub. Auth. Law § 1275); and the LIRR may conduct investigations and hearings and may apply for process of subpoena in aid thereof (*Id.* § 1265(12)). The LIRR also has a host of other governmental powers—including the power of eminent domain—which are set forth more fully in Appellee's Brief at 14-28.

The State of New York has a special and important interest in the outcome of this action because of its historic relationship to the MTA and the LIRR. Specifically, because of this historic relationship, the State of New York has since its acquisition of the LIRR substantially supported the LIRR through the legislative powers, including the provision of annual operating assistance appropriations during the entire period ERISA has been effective (see Appendix at 279-87). The fact of the substantial and continuing State financial support of the LIRR shows that the concerns that led Congress to exempt "governmental plans" (i.e., that the taxpayers not be unduly burdened) are directly applicable with respect to the LIRR Plan (see Appellees' Br. at 46-50). If the Court were to rule that the LIRR Plan is not a "governmental plan", we understand that the retroactive application of the decision to 1976 and the consequent recalculation and resultant higher benefits for Plan participants could result in an even greater burden on the taxpayers of the State (see Appendix at 427-32).

The LIRR has been a governmental body since its acquisition by the State in 1966, not just since 1980 when it formally became a public benefit corporation. In no way was the LIRR less a governmental body before February 1980 when it formally was converted by charter amendment to public benefit corporation status (see Appendix at 680-700; Appellees' Br. at 14-18).

The statutory bases of the historic relationship between and among the LIRR, MTA and the State of New York are set forth more fully in defendants-appellees' Rule 3(g) statement submitted below (see Appendix at 673). The extent of the State's direct and statutorily mandated operating assistance provided to the LIRR through the MTA is set forth more fully in the affidavits of Kenneth Bauer, Comptroller of the MTA, and James D. Sullivan, Executive Vice President of the LIRR (See Appendix at 276 and 361, respectively; see also Appendix at 123-24).

On behalf of the State of New York, we respectfully request and urge that the Court affirm the District Court's Order granting the LIRR's motion for summary judgment dismissing the complaint on the grounds that the LIRR Plan is a "governmental plan" under ERISA.

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York

By:

/s/ JUDITH A. GORDON
Judith A. Gordon
Assistant Attorney General

cc: Clerk of the Court
Eugene P. Souther, Esq.
Edgar Pauk, Esq.
David Preminger, Esq.

APPENDIX C

INTERNAL REVENUE SERVICE

National Office Technical Advice Memorandum

District Director
Brooklyn District Office

Taxpayer's Name: The Long Island Rail Road
Taxpayer's Address: Jamaica Station
Jamaica, New York 11435
Taxpayer's Identification No.: 11-6002502

ISSUE:

Whether the Long Island Rail Road Company (Railroad) is an agency or instrumentality of the Metropolitan Transportation Authority (Authority) within the meaning of section 414(d) of the Internal Revenue Code of 1954 as added by the Employee Retirement Income Security Act of 1974 (ERISA).

STATEMENT OF FACTS:

The Long Island Rail Road Company (Railroad) was chartered by the State legislature in 1834 for a 50-year period, which was extended in 1883 for an additional 250 years with the consent of its stockholders. In 1965, pursuant to the Metropolitan Commuter Transportation Act (Act) (Chapter 324 of the Laws of New York for 1965, as amended) the State of New York created the Metropolitan Commuter Transportation Authority, which is now the Metropolitan Transportation Authority (Authority). It was organized as a public benefit organization and given the power to purchase the Railroad. Accordingly, on December 22, 1965, the Authority purchased from the Pennsylvania Railroad Company (Pennsylvania) all of the issued and outstanding stock of the Railroad and at the same time acquired from Pennsylvania all debt securities (with minor exceptions) previously issued by the Railroad.

The Authority has a Board of Directors consisting of a chairman and ten other members who are appointed by the Governor with the consent of the Senate. This same Board of Directors also acts as the Board for the Railroad. Furthermore, the Chairman of the Board is the chief executive officer of the Railroad. In addition, the Railroad must obtain approval from the Board prior to (1) making capital expenditures, (2) engaging in a lease arrangement, (3) selling property, or (4) changing the train schedule and fares.

Since 1966, the stock of the Railroad has been wholly owned by the Authority, and only the Authority has access to the Railroad's earnings and profits. Also, if the Railroad should go into bankruptcy, any assets remaining after liquidation revert to the Authority, which is the sole shareholder of the Railroad stock. Upon termination of the Authority, all rights and properties of the Authority, including corporate stock owned by it, become vested in the State.

In a ruling issued on July 27, 1967 by the then Corporation Tax Branch, it was held that the Metropolitan Commuter Transportation Authority (Predecessor Authority) is a political subdivision of the State within the meaning of section 115(a)(1) of the Code but that, since the Railroad is a legal entity separate and distinct from the Authority, its income does not accrue to the Authority within the meaning of section 115(a) of the Code and thus it is not a political subdivision of the State and its income is not exempt from Federal income taxation.

However, the taxpayer contends that section 414(d) of the Code as added by ERISA is broader than section 115(a) of the Code, because the former section includes within its scope an agency or instrumentality of a political subdivision, whereas the latter includes only political subdivisions. The taxpayer goes on to say that the Railroad is a creature and instrumentality of the Authority, which, in turn, is a political subdivision of the State of New York.

APPLICABLE LAW:

Section 414(d) of the Code as added by ERISA provides that for purposes of this part, the term "governmental plan" means a plan established and maintained for its employees by the Government of the United States, by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.

CONCLUSION:

We conclude, based on the facts in this case that the Railroad is an agency or instrumentality of the Authority within the meaning of section 414(d) of the Code.

—END—

APPENDIX D

* * *

[19] State of New York and that includes the amount of money to fund the Long Island Railroad Pension Plan? Was that your testimony?

A I said the basis for the State Controller's recommendation is that it was his feeling that all money comes from the State of New York and that, therefore, he made a recommendation of a Pay As You Go basis.

Q Is the feeling of the State Controller consistent with your knowledge of the source of funding for the Long Island Railroad Pension Plan?

MR. SOUTHER: You mean back in 1971?

MR. PAUK: At any time since 1971.

A It's—I'm thinking.

MR. SOUTHER: Do you understand the question?

THE WITNESS: Yes. I'm trying to think how to put my answer.

A The MTA gets its money primarily from three sources: The Federal Government since 1974; from Local Government, approximately 1974; and from the State since the MTA's inception, but the State is the only one of the three sources through which the amount can vary or increase in amount substantially.

The MTA has very little say-so in going to Congress or the Federal Government for funds. Local [20] Governments, there are twelve counties that it receives funds from. The sources there are rather limited.

But the State is really the only source of money outside of the Long Island Railroad's only resource which is the fare box.

So for all practical purposes, the State is the only source of funds to fund the Pension Plan for the Long Island Railroad.

Q To your knowledge, are the fare box receipts of the Long Island Railroad earmarked for non-pension fund expenses?

A Say that again.

Q To your knowledge, are the fare box receipts of the Long Island Railroad earmarked for purposes other than funding the Pension Plan?

A They fund salaries, wages, all operating expenses to the extent that they provide those services.

Q Including funding the Pension Plan?

A Yes.

Q How was the MTA set up? Do you know?

MR. SOUTHER: I object to the form of the question.

Q To your knowledge, who created the MTA?

A The State Legislature.

STATUTORY APPENDIX

New York Criminal Procedure Law

§ 1.20. Definitions of terms of general use in this chapter.

Except where different meanings are expressly specified in subsequent provisions of this chapter, the term definitions contained in Section 10.00 of the penal law are applicable to this chapter, and, in addition, the following terms have the following meanings:

* * *

34. "Police officer." The following persons are police officers:

* * *

(1) Long Island railroad police.

1965 N.Y. Laws ch. 324

An Act to amend the public authorities law and the state finance law, in relation to the creation of the metropolitan commuter transportation authority and making an appropriation therefor.

Approved and effective June 1, 1965.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and declaration of purpose. It is hereby found and declared that:

1. Efficient and adequate transportation of commuters within the New York metropolitan area is of vital importance to the commerce, defense and general welfare of the people of the New York metropolitan area, the state, and the nation.

2. The continued deterioration of the financial situation and physical condition of the Long Island Rail Road, the New York, New Haven and Hartford Railroad and other companies providing rail commuter transportation services constitutes a serious threat to the economic well-being of the state.

3. This deterioration of rail commuter service has continued despite action by this state to provide modern commuter car equipment, substantial real property tax relief and station maintenance programs for eligible rail commuter transportation systems and despite intensive regional planning and programs conducted in concert with neighboring states and the pursuit of federal aid.

4. The federal government, the state and local governments have spent billions of dollars in recent years to provide limited access highways in the New York metropolitan area. The diminution or discontinuance of rail commuter transportation services would necessitate even greater expenditures for highways at great expense to the taxpayers and great inconvenience to the commuters and the people working or residing in the area.

5. In order to help insure a healthy economy for the state and the New York metropolitan area, the provision of adequate commuter facilities for the transportation of persons must be assured.

6. The urgent and immediate need for the stabilization, strengthening and improvement of commuter services for the transportation of persons in the metropolitan area can be met by the creation of a public authority to serve as the state's instrument for the carrying out of programs designed to continue and improve commuter services.

7. Through such public authority the state could deal flexibly and efficiently with the differing financial, managerial and operational problems involved in insuring the continuation of such essential commuter services as those presently being provided by the Long Island Rail Road and the New York, New Haven and Hartford Railroad.

8. It is declared to be the policy of the state that the preservation, strengthening and improvement of commuter services is an essential public purpose, and that it is in the public interest for the state and its political subdivisions, in

cooperation with other levels of government, to take appropriate measures and assume responsibilities for the preservation of such essential services.

* * *

New York Public Authorities Law

§ 1260. Short Title

This title may be cited as the "Metropolitan Transportation Authority Act."

§ 1261. Definitions

As used or referred to in this title, unless a different meaning clearly appears from the context:

* * *

13. "State agency" shall mean any officer, department, board, commissioner, bureau, division, public benefit corporation, agency or instrumentality of the state.

§ 1262. Metropolitan commuter transportation district

There is hereby created and established a commuter transportation district to be known as the metropolitan commuter transportation district which shall embrace the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk and Westchester, provided, however, that the district shall not include a county that has withdrawn from the district pursuant to section twelve hundred seventy-nine-b of this article.

§ 1263. Metropolitan transportation authority

1. (a) There is hereby created the "metropolitan transportation authority." The authority shall be a body corporate and politic constituting a public benefit corporation. The authority shall consist of a chairman and sixteen other members appointed by the governor by and with the advice and consent of

the senate. Four of the sixteen members other than the chairman shall be appointed on the written recommendation of the mayor of the city of New York; and each of seven other members other than the chairman shall be appointed after selection from a written list of three recommendations from the chief executive officer of the county in which the particular member is required to reside pursuant to the provisions of this subdivision.

* * *

(b) Vacancies occurring otherwise than by expiration of term shall be filed in the same manner as original appointments for the balance of the unexpired term.

* * *

5. The authority shall be a "state agency" for the purposes of sections seventy-three and seventy-four of the public officers law.

§ 1264. Purposes of the authority

1. The purposes of the authority shall be the continuance, further development and improvement of commuter transportation and other services related thereto within the metropolitan commuter transportation district, including but not limited to such transportation by railroad, omnibus, marine and air, in accordance with the provisions of this title. It shall be the further purpose of the authority, consistent with its status as the ex officio board of both the New York city transit authority and the triborough bridge and tunnel authority, to develop and implement a unified mass transportation policy for such district.

2. It is hereby found and declared that such purposes are in all respects for the benefit of the people of the state of New York and the authority shall be regarded as performing an essential governmental function in carrying out its purposes and in exercising the powers granted by this title.

§ 1265. General powers of the authority

Except as otherwise limited by this title, the authority shall have power:

* * *

9. (b) The authority and any of its public benefit subsidiary corporations may be a "participating employer" in the New York state employees' retirement system with respect to one or more classes of officers and employees of such authority or any such public benefit subsidiary corporation, as may be provided by resolution of such authority or any such public benefit subsidiary corporation, as the case may be, or any subsequent amendment thereof, filed with the comptroller and accepted by him pursuant to section thirty-one of the retirement and social security law. In taking any action pursuant to this paragraph (b), the authority and any of its public benefit subsidiary corporations shall consider the coverages and benefits continued or provided pursuant to paragraph (a) of this subdivision;

* * *

12. The authority may conduct investigations and hearings in the furtherance of its general purposes, and in aid thereof have access to any books, records or papers relevant thereto; and if any person whose testimony shall be required for the proper performance of the duties of the authority shall fail or refuse to aid or assist the authority in the conduct of any investigation or hearing, or to provide any relevant books, records or other papers, the authority is authorized to apply for process of subpoena, to issue out of any court of general original jurisdiction whose process can reach such person, upon due cause shown;

* * *

14. To do all things necessary, convenient or desirable to carry out its purposes and for the exercise of the powers granted in this title.

§ 1266. Special powers of the authority

In order to effectuate the purposes of this title:

1. The authority may acquire, by purchase, gift, grant, transfer, contract or lease, any transportation facility, wholly or partially within the metropolitan commuter transportation district, or any part thereof, or the use thereof, and may enter into any joint service arrangements as hereinafter provided. Any such acquisition of joint service arrangement shall be authorized only by resolution of the authority approved by not less than a majority vote of the whole number of members of the authority then in office, except that in the event of a tie vote the chairman shall cast one additional vote.

2. The authority may on such terms and conditions as the authority may determine necessary, convenient or desirable itself establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any such transportation facility, or may provide for such establishment, construction, effectuation, operation, maintenance, renovation, improvement, extension or repair by contract, lease or other arrangement on such terms as the authority may deem necessary, convenient or desirable with any person, including but not limited to any common carrier or freight forwarder, the state, any state agency, the federal government, any other state or agency or instrumentality thereof, any public authority of this or any other state, the port of New York authority or any political subdivision or municipality of the state. In connection with the operation of any such transportation facility, the authority may establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair or may provide by contract, lease or other arrangement for the establishment, construction, effectuation, operation, maintenance, renovation, improvement, extension or repair of any related services and activities it deems necessary, convenient or desirable, including but not limited to the transportation and storage of freight and the United States mail, feeder and connecting transportation, parking areas, transportation centers, stations and related facilities.

3. The authority may establish, levy and collect or cause to be established, levied and collected and, in the case of a joint service arrangement, join with others in the establishment, levy and collection of such fares, tolls, rentals, rates, charges and other fees as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or by a subsidiary corporation of the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Any such fares, tolls, rentals, rates, charges or other fees for the transportation of passengers shall be established and changed only if approved by resolution of the authority adopted by not less than a majority vote of the whole number of members of the authority then in office, with the chairman having one additional vote in the event of a tie vote, and only after a public hearing, provided however, that fares, tolls, rentals, rates, charges or other fees for the transportation of passengers on any transportation facility which are in effect at the time that the then owner of such transportation facility becomes a subsidiary corporation of the authority or at the time that operation of such transportation facility is commenced by the authority or is commenced under contract, lease or other arrangement, including joint service arrangements, with the authority may be continued in effect without such a hearing. Such fares, tolls, rentals, rates, charges and other fees shall be established as may in the judgment of the authority be necessary to maintain the combined operations of the authority and its subsidiary corporations on a self-sustaining basis. The said operations shall be deemed to be on a self-sustaining basis as required by this title, when the authority is able to pay or cause to be paid from revenue and any other funds or property actually available to the authority and its subsidiary corporations (a) as the same shall become due, the principal of and interest on the bonds and notes and other obligations of the authority and of such subsidiary corporations, together with the maintenance of proper reserves therefor, (b) the cost and expense of keeping the properties and assets of the authority and its subsidiary corporations in good condition and repair,

and (c) the capital and operating expenses of the authority and its subsidiary corporations. The authority may contract with the holders of bonds and notes with respect to the exercise of the powers authorized by this section. No acts or activities taken or proposed to be taken by the authority or any subsidiary of the authority pursuant to the provisions of this subdivision shall be deemed to be "actions" for the purposes or within the meaning of article eight of the environmental conservation law.

4. The authority may establish and, in the case of joint service arrangements, join with others in the establishment of such schedules and standards of operations and such other rules and regulations including but not limited to rules and regulations governing the conduct and safety of the public as it may deem necessary, convenient or desirable for the use and operation of any transportation facility and related services operated by the authority or under contract, lease or other arrangement, including joint service arrangements, with the authority. Such rules and regulations governing the conduct and safety of the public shall be filed with the department of state in the manner provided by section one hundred two of the executive law. In the case of any conflict between any such rule or regulation of the authority governing the conduct or safety of the public and any local law, ordinance, rule or regulation, such rule or regulation of the authority shall prevail. Violation of any such rule or regulation of the authority governing the conduct or the safety of the public in or upon any facility of the authority shall constitute an offense and shall be punishable by a fine not exceeding fifty dollars or imprisonment for not more than thirty days or both.

5. The authority may acquire, hold, own, lease, establish, construct, effectuate, operate, maintain, renovate, improve, extend or repair any of its facilities through, and cause any one or more of its powers, duties, functions or activities to be exercised or performed by, one or more wholly owned subsidiary corporations of the authority and may transfer to or from any such corporation any moneys, real property or other

property for any of the purposes of this title. The directors or members of each such subsidiary corporation shall be the same persons holding the offices of members of the authority. Each such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the authority and of the authority's property, functions and activities. Each such subsidiary corporation shall be subject to the restrictions and limitations to which the authority may be subject. Each such subsidiary corporation shall be subject to suit in accordance with section twelve hundred seventy-six of this title. The employees of any such subsidiary corporation, except those who are also employees of the authority, shall not be deemed employees of the authority.

If the authority shall determine that one or more of its subsidiary corporations should be in the form of a public benefit corporation, it shall create each such public benefit corporation by executing and filing with the secretary of state a certificate of incorporation, which may be amended from time to time by filing, which shall set forth the name of such public benefit subsidiary corporation, its duration, the location of its principal office, and any or all of the purposes of acquiring, owning, leasing, establishing, constructing, effectuating, operating, maintaining, renovating, improving, extending or repairing one or more facilities of the authority. Each such public benefit subsidiary corporation shall be a body politic and corporate and shall have all those powers vested in the authority by the provisions of this title which the authority shall determine to include in its certificate of incorporation except the power to contract indebtedness.

Whenever any state, political subdivision, municipality, commission, agency, officer, department, board, division or person is authorized and empowered for any of the purposes of this title to co-operate and enter into agreements with the authority such state, political subdivision, municipality, commission, agency, officer, department, board, division or person shall have the same authorization and power for any of such

purposes to co-operate and enter into agreements with a subsidiary corporation of the authority.

6. The authority, in its own name or in the name of the state, may apply for and receive and accept grants of property, money and services and other assistance offered or made available to it by any person, government or agency whatever, which it may use to meet capital or operating expenses and for any other use within the scope of its powers, and to negotiate for the same upon such terms and conditions as the authority may determine to be necessary, convenient or desirable.

7. The authority may lease railroad cars for use in its passenger service pursuant to the provisions of chapter six hundred thirty-eight of the laws of nineteen hundred fifty-nine.

8. The authority may do all things it deems necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement with the authority. Except as hereinafter specially provided, no municipality or political subdivision, including but not limited to a county, city, village, town or school or other district shall have jurisdiction over any facilities of the authority or any of its activities or operations. The local laws, resolutions, ordinances, rules and regulations of a municipality or political subdivision, heretofore or hereafter adopted, conflicting with this title or any rule or regulation of the authority, shall not be applicable to the activities or operations of the authority, or the facilities of the authority, except such facilities that are devoted to purposes other than transportation purposes. Each municipality or political subdivision, including but not limited to a county, city, village, town or district in which any facilities of the authority are located shall provide for such facilities police, fire and health protection services of the same character and to the same extent as those provided for residents of such municipality or political subdivision.

The jurisdiction, supervision, powers and duties of the department of transportation of the state under the transportation law shall not extend to the authority in the exercise of any of its powers under the title. The authority may agree with such department for the execution by such department of any grade crossing elimination project or any grade crossing separation reconstruction project along any railroad facility operated by the authority or by one of its subsidiary corporations or under contract, lease or other arrangement with the authority. Any such project shall be executed as provided in article ten of the transportation law and the railroad law, respectively, and the costs of any such project shall be borne as provided in such laws, except that the authority's share of such costs shall be borne by the state.

9. Upon approval by the commissioner of transportation of the state of New York (or his successor) of detailed plans and specifications, which approval may be based upon considerations of relative need and the timing of construction, the authority is authorized to design, construct, maintain, operate, improve and reconstruct a highway bridge crossing Long Island sound, as follows:

* * *

10. Notwithstanding the provisions of any other law, general, special or local, or of any agreement entered into in pursuance thereof, relating to the repayment of any loan or advance made by the state to the authority or to the New York city transit authority, neither the authority nor the New York city transit authority shall be required to repay any such loan or advance heretofore made from or by reason of the issuance of bonds or notes of either of them or from the proceeds realized upon such issuance or from any other funds received by either of them from any source whatever in aid or assistance of the project or projects for the financing of which such bonds or notes are issued.

11. No project to be constructed upon real property theretofore used for a transportation purpose, or on an insubstantial addition to such property contiguous thereto, which will not change in a material respect the general character of such prior transportation use, nor any acts or activities in connection with such project, shall be subject to the provisions of article eight, nineteen, twenty-four or twenty-five of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article. Nor shall any acts or activities taken or proposed to be taken by the authority or by any other person or entity, public or private, in connection with the planning, design, acquisition, improvement, construction, reconstruction or rehabilitation of a transportation facility, other than a marine or aviation facility, be subject to the provisions of article eight of the environmental conservation law, or to any local law or ordinance adopted pursuant to any such article if such acts or activities require the preparation of a statement under or pursuant to any federal law or regulation as to the environmental impact thereof.

12. The authority may, upon suitable notice to and an offer to consult with an officer designated by the city of New York, occupy the streets of the city of New York for the purpose of doing any work over or under the same in connection with the improvement, construction, reconstruction or rehabilitation of a transportation facility without the consent of or payment to such city.

* * *

§ 1267. Acquisition and disposition of real property

1. In addition to the powers provided in section twelve hundred sixty-six of this title to acquire transportation facilities, equipment and real property, the authority may acquire, by condemnation pursuant to the condemnation law, any real property it may deem necessary, convenient or desirable to effectuate the purposes of this title, provided however, that any such condemnation proceedings shall be brought only in the supreme court and the compensation to be paid shall be

ascertained and determined by the court without a jury. Notwithstand[ing] the foregoing provisions of this subdivision one, no real property may be acquired by the authority by condemnation for purposes other than a transportation facility unless the governing body of the city, village or town in which such real property is located shall first consent to such condemnation.

2. Nothing herein contained shall be construed to prevent the authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary or from acquiring any such property by negotiation or purchase.

3. Where a person entitled to an award in the proceedings to condemn any real property for any of the purposes of this title remains in possession of such property after the time of the vesting of title in the condemnor, the reasonable value of his use and occupancy of such property subsequent to such time as fixed by agreement or by the court in such proceedings or by any court of competent jurisdiction shall be a lien against such award subject only to the liens of record at the time of vesting of title in the condemnor.

4. Title to all property acquired under this act shall vest in the authority.

5. The authority may, whenever it determines that it is in the interest of the authority, dispose of any real property or property other than real property, which it determines is not necessary, convenient or desirable for its purposes.

6. The authority may, whenever it shall determine that it is in the interest of the authority, rent, lease, or grant easements or other rights in, any land or property of the authority.

§ 1267-a. Acquisition and disposition of real property by department of transportation

If funds are made available by the authority for the payment of the cost and expense of the acquisition thereof, the commis-

sioner of transportation of the state of New York, when requested by the authority, may acquire such real property in the name of the state as may be determined from time to time by the authority as being necessary, convenient or desirable to effectuate the purposes of this title, may remove the owner or occupant thereof where necessary and obtain possession and, when requested by the authority, may dispose of any real property so acquired, all according to the procedure provided in section thirty of the highway law. The authority shall have the right to possess and use for its corporate purposes all such real property so acquired. Claims for the value of the property appropriated and for legal damages caused by any such appropriation shall be adjusted and determined by such commissioner with the approval of the authority or by the court of claims as provided in section thirty of the highway law. When a claim has been filed with the court of claims, the claimant shall cause a copy of such claim to be served upon the authority and the authority shall have the right to be represented and heard before such court. All awards and judgments arising from such claims shall be paid out of moneys of the authority. No real property may be acquired pursuant to the provisions of this section for purposes other than a transportation facility unless the governing board of the city, village or town in which such real property is located shall first consent to such acquisition. The provisions of this section shall not be applicable to the acquisition or disposition of real property required for the construction of the two highway bridges crossing Long Island sound referred to in section twelve hundred sixty-six of this chapter. The authority shall be empowered to lease for such other purposes as the authority may determine any part or parts of Republic airport not needed for transportation purposes.

§ 1275. Exemption from taxation

It is hereby found, determined and declared that the creation of the authority and the carrying out of its purposes is in all respects for the benefit of the people of the state of New York

and for the improvement of their health, welfare and prosperity and is a public purpose, and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this title. Without limiting the generality of the following provisions of this section, property owned by the authority, property leased by the authority and used for transportation purposes, and property used for transportation purposes by or for the benefit of the authority exclusively pursuant to the provisions of a joint service arrangement or of a joint facilities agreement or trackage rights agreement shall all be exempt from taxation and special ad valorem levies. The authority shall be required to pay no fees, taxes or assessments, whether state or local, including but not limited to fees, taxes or assessments on real estate, franchise taxes, sales taxes or other excise taxes, upon any of its property, or upon the use thereof, or upon its activities in the operation and maintenance of its facilities or on any fares, tolls, rentals, rates, charges or other fees, revenues or other income received by the authority and the bonds of the authority and the income therefrom shall at all times be exempt from taxation, except for gift and state taxes and taxes on transfers. This section shall constitute a covenant and agreement with the holders of all bonds issued by the authority. The terms "taxation" and "special ad valorem levy" shall have the same meanings as defined in section one hundred two of the real property tax law and the term "transportation purposes" shall have the same meaning as used in titles two-a and two-b of article four of such law.

§ 1276. Actions against the authority

1. As a condition to the consent of the state to such suits against the authority, in every action against the authority for damages, for injuries to real or personal property or for the destruction thereof, or for personal injuries or death, the eomplaint shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action is founded were presented to a member of the

authority or other officer designated for such purpose and that the authority has neglected or refused to make an adjustment or payment thereof.

2. An action against the authority founded on tort shall not be commenced more than one year after the cause of action therefor shall have accrued, nor unless a notice of claim shall have been served on the authority within the time limited by and in compliance with all the requirements of section fifty-e of the general municipal law.

3. The authority shall be liable, and shall assume the liability to the extent that it shall save harmless any duly appointed officer or employee of the authority, for the negligence of such officer or employee, in the operation of a vehicle or other facility of transportation owned or otherwise under the jurisdiction and control of the authority in the discharge of a duty imposed upon such officer or employee at the time of the accident, injury or damages complained of, while otherwise acting in the performance of his duties and within the scope of his employment.

4. The authority may require any person, presenting for settlement an account or claim for any cause whatever against the authority, to be sworn before a member, counsel or an attorney, officer or employee of the authority designated for such purpose, concerning such account or claim and when so sworn to answer orally as to any facts relative to such account or claim. The authority shall have power to settle or adjust all claims in favor of or against the authority.

* * *

§ 1276-a. Annual audit of authority

The comptroller shall conduct an annual audit of the books and records of the authority and its subsidiary corporations. Such audit shall include a complete and thorough examination of such authority's receipts, disbursements, revenues and expenses during the prior fiscal year in accordance with the categories or classifications established by such authority for

its own operating and capital outlay purposes; assets and liabilities at the end of its last fiscal year including the status of reserve, depreciation, special or other funds and including the receipts and payments of these funds; schedule of bonds and notes outstanding at the end of its fiscal year and their redemption dates, together with a statement of the amounts redeemed and incurred during such fiscal year; operations, debt service and capital construction during the prior fiscal year.

The comptroller, upon completion of such audit, shall within sixty days thereafter, report to the governor and the legislature his findings, conclusions and recommendations thereof.

§ 1277. Station operation and maintenance

The operation, maintenance and use of passenger stations shall be public purposes of the city of New York and the counties within the district. The total cost to the authority and each of its subsidiary corporations of operation, maintenance and use of each passenger station within the district served by one or more railroad facilities of the authority or of such subsidiary corporation, including the buildings, appurtenances, platforms, lands and approaches incidental or adjacent thereto, shall be borne by the city of New York if such station is located in such city or, if not located in the such city, by such county within the district in which such station is located. On or before June first of each year, the authority shall determine and certify to the city of New York and to each such county the total cost to the authority and its subsidiary corporations, for the twelve-month period ending the preceding March thirty-first, of operation maintenance and use of each such passenger station within such city and each such county, respectively. On or before the following September first, of each year, such city and each such county shall pay to the authority such cost so certified to it on or before the preceding June first. If for such twelve-month period the authority determines that the total revenues of any railroad facility will be such as not to require payment for the full amount of the costs of operation, mainte-

nance and use of the passenger stations served by such facility, the authority in its discretion may reduce by a uniform percentage of established costs the amounts required of the city of New York, if such city is served by such facility, and each county so served, provided however, that the amount required of such city or any such county shall not be reduced for any such twelve-month period below the total cost to the authority and its subsidiary corporation so certified of maintenance and use of such passenger stations so served in such city or such county. Such city and each such county shall have power to finance such costs to it by the issuance of budget notes pursuant to section 29.00 of the local finance law.

In the event that a city or county shall fail to make payment to the authority for station maintenance as required pursuant to this section, or any part thereof, the chief executive officer of the authority or such other person as the chairman shall designate shall certify to the state comptroller the amount due and owing the authority at the end of the state fiscal year and the state comptroller shall withhold an equivalent amount from the next succeeding state aid allocated to such county or city from the motor fuel tax and the motor vehicle registration fee distributed pursuant to section one hundred twelve of the highway law, or amounts distributed pursuant to section ten-c of the highway law, or per capita local assistance pursuant to section fifty-four of the state finance law subject to the following limitations: prior to withholding amounts due the authority from such county or city, the comptroller shall pay in full any amount due the state of New York municipal bond bank agency, on account of any such county's or city's obligation to such agency; the city university construction fund pursuant to the provisions of the city university construction fund act; the New York city housing development corporation, pursuant to the provisions of the New York city housing development corporation act (article twelve of the private housing finance law); and the transit construction fund pursuant to the provisions of title nine-a of article five of the public authorities law. The comptroller shall give the director of the budget notification of any such payment. Such amount or

amounts so withheld by the comptroller shall be paid to the authority and the authority shall use such amount for the repayment of the state advances hereby authorized. When such amount or amounts are received by the authority, it shall credit such amounts against any amounts due and owing by the city or county on whose account such amount was withheld and paid.